

HOW DARE THEY? EUROPEAN MERGER CONTROL AND THE EUROPEAN COMMISSION'S BLOCKING OF THE GENERAL ELECTRIC/HONEYWELL MERGER

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1. INTRODUCTION

In light of the growing globalization of markets and industries it is inevitable that antitrust authorities, as the guardians of fair competition, are increasingly unable to restrict their investigations to their own soil and markets.¹ This applies not only to national authorities like the Antitrust Division of the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC") in the United States, but also to supranational authorities such as the European Commission.² These authorities must look at the mergers that take place in their own backyards as well as in other jurisdictions and assess what effect these "foreign" mergers may have on their own markets. Therefore, it is not surprising that mergers that first appear to be purely American in nature, such as Boeing and McDonnell Douglas,³ AOL and Time Warner,⁴ or MCI WorldCom and

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¹ See, e.g., Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, 18 WIS. INT'L L.J. 577, 578 (2000); Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3 (1997); William M. Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 NW. J. INT'L L. & BUS. 287 (2000); Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 COLUM. J. EUR. L. 289, 312 (2000).

² Commission of the European Communities [hereinafter "the Commission"].

³ Case IV/M.877, *Boeing/McDonnell Douglas v. Commission*, 1997 O.J. (L 336) 16 [hereinafter *Boeing/McDonnell Douglas*].

⁴ Case COMP/M.1845, *AOL/Time Warner v. Commission* (2000) [hereinafter *AOL/Time Warner*], available at http://www.europa.eu.int/comm/competition/mergers/cases/decisions/m1845_en.pdf.

Sprint (the first U.S. merger which the Commission prevented),⁵ have been the subject of intense scrutiny by the Commission.⁶

The decision of the Commission on July 3, 2001⁷ to stop the merger between General Electric Company ("GE") and Honeywell International, Inc. ("Honeywell") on the basis of EC merger control⁸ was groundbreaking. It was the first time the Commission stopped a U.S. merger that had already received clearance from its "home" authority, in this case the DOJ. This broke a tacit understanding between merger regulators that if two big American organizations plan to merge, the American authorities would usually rule first and the Europeans would follow their lead in approving, disapproving, or imposing conditions to safeguard competition in Europe.⁹

Not surprisingly, the prohibition of the merger has led to some very harsh remarks on the western side of the Atlantic.¹⁰ Prior to

⁵ Case COMP/M.1741, *MCI WorldCom/Sprint v. Commission* (2000) [hereinafter *MCI WorldCom/Sprint*], available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m1741_en.pdf.

⁶ The latest decision in this respect was made in the takeover of U.S.-based travel online travel operator Galileo International, Inc., by Cendant Corp., a travel and residential real estate services company also based in the United States; see Commission Press Release, *Commission Clears Acquisition of Sole Control over Galileo by Cendant* (Both U.S. Based), IP/01/1307, available at <http://www.eurunion.org/news/press/2001/2001070.htm> (Sept. 24, 2001).

⁷ Case COMP/M.2220, *General Electric/Honeywell v. Commission* (2001) [hereinafter *GE/Honeywell*], available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

⁸ This Article will refer to the merger control of the European Community ("EC") rather than the European Union ("EU") because the merger control rules pertain only to the EC, and not to the EU. With regard to the relationship between the two, it can be said that the EC (together with the Coal and Steel Community and the European Atomic Energy Community) forms one pillar of the EU, with the Common Foreign and Security Policy, and the Cooperation in Criminal Matters forming the other two pillars.

⁹ See *Labour Turns to City*, *THE ECONOMIST*, May 24, 1997, at 14; Sondra Roberto, *The Boeing/McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers*, 24 *BROOKLYN J. INT'L L.* 593, 616 (1998).

¹⁰ U.S. Republican Senator Phil Gramm said on part-GE-owned CNBC: "It's a very real question what power the EU should have in dealing with two companies that are fundamentally American companies," quoted in Chris Marsden, *U.S. and Europe split on GE Takeover of Honeywell*, World Socialist Website at <http://www.wsws.org/articles/2001/jun2001/gec-j21.shtml> (June 21, 2001). Democratic Senators John "Jay" D. Rockefeller IV and Ernest F. Hollings warned of possible retaliatory action by Washington. See William Drozdiak, *European Union Kills GE Deal*, *WASH. POST*, July 4, 2001, at A1. U.S.-Treasury Secretary O'Neill called the decision "off the wall" and said that something needed to be done to bring the EU back in line, Brian M. Carney, *Loggerheads: Mario Monti, Cen-*

the decision, U.S. President George W. Bush even raised the issue during his trip to Europe in June 2001, causing an equally ardent response from the Commission.¹¹ However, at face value, this decision was not that surprising, as it was only a matter of time before the European and U.S. systems would produce different results.¹² These differences have been there all along, and are well known and publicized—facts that make the reaction even more surprising.¹³ The decision also showed a new approach by the Commission regarding a substantive test for the legality of a merger, allowing for consideration of bundling of goods and services from two different markets.¹⁴

Despite the harsh words, the Commission's decision should be looked at without prejudice. The Commission's view on the markets concerned and the position of GE and Honeywell therein, is, in some areas, certainly debatable. But this does not mean that the decision itself was a politically motivated attack on American business,¹⁵ without substance in European law. Rather, as will be shown below, the outcome is the result of differences between the approaches of U.S. and European merger control¹⁶—a fact that

tral Planner, WALL ST. J. EUR., July 6, 2001, at 6. Similar comments were made when the Commission investigated the Boeing/McDonnell Douglas merger. See Amy Ann Karpel, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S. – EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029, 1031 (1998); Roberto, *supra* note 9, at 594.

¹¹ Competition Commissioner Mario Monti is quoted as having said: "I deplore attempts to misinform the public and to trigger political intervention This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics." Kevin Done et al., *Dispute over GE Takeover Deepens*, FIN. TIMES, June 19, 2001, at 1.

¹² Mario Monti, *Antitrust in the U.S. and Europe: A History of Convergence*, Speech presented at the General Counsel Roundtable of the American Bar Association, at 3 (Nov. 14, 2001), available at <http://www.eurunion.org/news/speeches/2001/011114mm.htm>.

¹³ John DeQ. Briggs & Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell*, 16 ANTITRUST 26 (Fall 2001).

¹⁴ See *infra* Part 4.2.2.1.2.2.3.

¹⁵ The decision was also not, as has been suggested, a revenge for the U.S. blocking of the BOC-Air Products/Air Liquide merger which already had received the approval of the Commission, or even for the decision of President Bush to abandon the Kyoto accord.

¹⁶ European merger control is based on the question of Market Dominance ("MD") whereas U.S. merger control follows the Substantive Lessening of Competition test ("SLC"). The details of the different systems will be discussed, *infra* Part 2.1.2.2.

does not per se affect the validity of the European decision.¹⁷ It should also be noted that the mere fact that the Commission, as a non-U.S. authority, looked into a merger of two U.S. companies, was not based on some kind of European neo-imperialism but on a legal concept originally developed in the United States and only subsequently adopted and applied by other countries and by the Commission.

This Article first provides a brief overview¹⁸ of EC competition law. The rules and procedures of EC Competition law show the legal framework within which the Commission acted. The Article will then address how this framework compares to U.S. antitrust law. It will also look at previous Commission decisions with regard to mergers between U.S. companies. Next, the decision of the Commission in *GE/Honeywell* will be outlined and analyzed in detail. Finally, the Article will address some of the comments and criticisms of the EC made during and after the procedure that led to the final lapse of the merger.

2. MERGER CONTROL IN THE EC

In order to understand the Commission's decision in *GE/Honeywell*, it is necessary to outline how European merger control works and how *GE/Honeywell* fits into this framework. Where appropriate, parallels to the U.S. system will be drawn.

2.1. The European Merger Control Regulation

Specific rules on merger control as part of EC Law are relatively new,¹⁹ especially when compared to the U.S. merger control

¹⁷ Cf. Charles Grant, *Euro-Muscle: The EU is Emerging as a Superpower, and That's Good for the U.S., Too*, WASH. POST, July 8, 2001, at B2. Karpel commented to the same effect in her discussion of the Boeing/McDonnell Douglas decision. See Karpel *supra* note 10, at 1029.

¹⁸ It is not intended to nor can it encompass in depth all the aspects of European Merger Control. For a comprehensive overview of the European merger control regime, see CHRISTOPHER JONES & ENRIQUE GONZÁLEZ-DÍAZ, *THE EEC MERGER REGULATION* (1992); JOHN COOK & CHRISTOPHER KERSE, *EC Merger Control* (1999); JOSÉ RIVAS, *THE EU MERGER REGULATION AND THE ANATOMY OF THE MERGER TASK FORCE* (2000).

¹⁹ There has been a merger provision in Article 4 of the Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, *as amended* Treaties Establishing the European Communities (EC Off'l Pub. Off. 1987), as it results from Title III of the Treaty Establishing the European Union: Provisions Amending the Treaty Establishing the European Coal and Steel Com-

rules enshrined in the U.S. Clayton Act of 1914.²⁰ It was only in 1990 that the European Merger Control Regulation ("ECMR")²¹ came into effect.²² Before the enactment of the ECMR, mergers were dealt with by the general rules of competition law²³ as laid down in EC Articles 81 and 82,²⁴ which address concerted practices and the abuse of a dominant position and parallel Section 1 and Section 2 of the U.S. Sherman Antitrust Act. Merger control law and competition law in general on the European continent cannot claim as long a history as that of similar law in the United States. To the contrary, only very few countries had a merger control system established before the ECMR came into effect²⁵ and even general competition law has only recently been enacted in many countries.²⁶ This fact must not be underestimated because it shows

munity, 1997 O.J. (C 340) 145, art. H(1)-H(21), although this provision is only applicable to specific industries.

²⁰ However, the relevant provision in the Clayton Act (§ 7) did not have much practical relevance until the changes effected by the Celler-Kefauver Act of 1950. Before this, merger control in the United States was administered mostly under the provisions of general competition law enshrined in section one of the Sherman Act (between 1914 and 1950 only fifteen mergers were overturned in the United States, of which ten were based on the Sherman Act).

²¹ Council Regulation 4064/89 EEC of 21 December 1989 on the Control of the Concentration between Undertakings, 1990 O.J. (L 257) 13, as amended by Council Regulation 1310/97 EC of June 30, 1997, 1998 O.J. (L 180) 1 [hereinafter ECMR].

²² For a history of the European merger control regulation, see RICHARD WHISH, *COMPETITION LAW* 735 (4th ed. 2001).

²³ See Case 6/72, *Europemballage Corp. and Continental Can Co. Inc. v. Commission*, 1973 E.C.R. 215, 1973 C.M.L.R. 199 [hereinafter *Continental Can*]; Case 142/84, 156/84, *British American Tobacco Co. Ltd. and R. J. Reynolds Indus. Inc. v. Comm. of the Eur. Union*, 1987 E.C.R. 4487, 2 C.M.L.R. 551 (1987).

²⁴ Treaty Establishing the European Community, May 1, 1999, 1997 O.J. (C 340) 173 (Consolidated Version). This is the Treaty of Rome, 1957, as amended by the Single European Act, 1986, the Maastricht Treaty on the European Union, 1992, and by the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997 O.J. (C 340) 1. In accordance with the practice of the European Court of Justice, articles of the Treaty Establishing the European Community as it stands after May 1, 1999 will be cited using "EC," whereas articles of the Treaty before that date will be cited using "of the EC-Treaty."

²⁵ The United Kingdom first introduced merger control in the Monopolies and Mergers Act of 1965. Germany added merger control provisions to its Act Against Restraints of Competition in 1973, 1973 BGBl. I S. 917. France introduced merger control in 1986 (Ordinance No. 86-1243 of December 1, 1986, J.O. 1986, p. 14,773, modified by Law No. 96-588 of July 1, 1996, J.O. 1996, p. 9983).

²⁶ Germany took the lead in Europe by introducing a so-called cartel regulation in 1923, i.e., more than thirty years after the Sherman Act. The German ex-

that there is less, if any, tradition of administering antitrust and merger control rules than in the United States, where these rules have been part of the law for almost a century.²⁷

Under the ECMR, all (and only) concentrations with a "Community Dimension" fall under the exclusive jurisdiction of the European authorities as opposed to that of one or more national authorities.²⁸ The criterion of Community Dimension is thus an indication of the dual role which the ECMR plays: it not only lays down rules to determine when a merger is lawful, it also identifies the areas of responsibility of the European and national authorities. Having established a Community Dimension, the substantive test under the ECMR asks whether or not a merger is "compatible with the Common Market."

2.1.1. *Concentration with a Community Dimension*

The term "concentration" in ECMR Article 3 encompasses mergers, acquisitions, and structural joint ventures.²⁹ In recital 23

ample was, however, not followed by other European countries. The situation in the United Kingdom was somewhat different. Although it introduced the Monopolies and Restrictive Practices Act as late as 1948, the Common Law doctrine of restraints of trade is much older and has roots as far back as the middle ages. This law also had, as the following note shows, considerable influence on the U.S. law.

²⁷ Competition law was actually applied prior to that date, through reliance on principles of Common Law. Senator Sherman himself, when introducing the new legislation, stated that the act bore nothing new but only "applies old and well recognized principles of the common law." 21 CONG. REC. 2456 (1890). In *Standard Oil of N.J. v. United States*, 221 U.S. 1, 51-62 (1910), the Supreme Court considered the situation before the passage of the Sherman Act at length, referring specifically to the law in England.

²⁸ According to Article 22(1), ECMR concentrations, whether they are of Community Dimension or not, are exclusively dealt with by the ECMR while the rules of general competition law do not apply. However, if a joint venture qualifies as a concentration within the meaning of ECMR Article 3, it can be assessed under general competition laws if it does not meet the revenue criteria for a Community Dimension.

²⁹ It is important to note that the ECMR is only applicable to joint ventures that are jointly controlled by the parent companies. Furthermore, the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity (full function joint venture). Until the changes in 1997, the ECMR distinguished between concentrative joint ventures and cooperative joint ventures. Council Regulation 1310/97 EC of June 30, 1997 Amending Regulation 4064/89 EEC on the Control of Concentrations Between Undertakings, 1997 O.J. (L 180) 1. The Commission described the details of how to distinguish between the two in a 1989 notice. Commission Notice on the Distinction Between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89 EEC on

of the ECMR, the concept of concentration is defined as covering only those operations that bring about a lasting change in the structure of the undertaking concerned. The Commission has published a notice³⁰ on how it intends to interpret the term concentration.³¹ If a deal does not qualify as a concentration within the meaning of ECMR Article 3, the Commission (and, depending on their own rules, possibly the national authorities) may scrutinize it under the rules of general competition law. In these circumstances it would also be possible for the national authorities to investigate under their merger control rules. This could happen, for example, in the case of a joint venture where the parent companies do not exercise joint control.³²

A concentration has a Community Dimension if the participating undertakings pass the turnover³³ threshold laid down in ECMR Article 1. There are two scenarios: first, a concentration has a Community Dimension if the combined annual worldwide turnover of all undertakings concerned exceeds €5 billion (\$4.6 billion) *and* if the European Community-wide turnover of each of at least two subsidiaries is more than €250 million (\$230 million).³⁴ In the case of *GE/Honeywell*, this threshold was easily passed.³⁵

the Control of Concentrations Between Undertakings, 1994 O.J. (C 385) 1. After the changes to the ECMR, a Commission Notice on how to identify a full-function joint venture replaced this notice in 1998. Commission Notice on the Concept of Full-Function Joint Ventures under Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1998 O.J. (C 66) 1.

³⁰ These notices are not binding rules but give a very good indication as to how the Commission will interpret the words in question; it is very unlikely that the Commission will deviate from its own guidelines. Cf. BELLAMY & CHILD, *COMMON MARKET LAW OF COMPETITION*, para. 1-060 (Vivien Rose ed., 4th ed. 1993) (noting that Commission Notices are for guidance but are not definitive principles).

³¹ Commission Notice on the Concept of Concentration Under Council Regulation 4064/89 EEC on the Control of Concentrations Between Undertakings, 1998 O.J. (C 66) 5.

³² This was done by the German competition authority, the Bundeskartellamt, in the case of the joint venture Covisint, which did not qualify as a concentration under EC law but was nevertheless a merger within the definition of German merger control. See Thomas Horton & Stefan Schmitz, *The Lessons of Covisint: Regulating B2B's Under European and American Competition Laws*, 47 WAYNE L. REV. (forthcoming Apr. 2002).

³³ European law uses the word "turnover" which corresponds to "revenues" in American English.

³⁴ ECMR, *supra* note 21, art. 1(2)(a)-(b).

³⁵ *GE/Honeywell*, *supra* note 7, para. 7.

The second threshold was introduced in 1997³⁶ to control mergers where a much lower turnover is involved, but the turnover is generated by a larger number of companies who are active in a larger number of Member States.³⁷ In order for a concentration to have a Community Dimension, more than two-thirds of the Community-wide turnover of the undertakings concerned may not be generated in a single Member State ("2/3 rule").³⁸ The ECMR thus aims at ensuring that only (and, if possible, all) truly "multi-national mergers" will be dealt with on an EC level, while those that concern the markets in the Member States will only be assessed by the competent national authorities.³⁹ For multinational mergers, the ECMR awards its greatest benefit, the "one-stop-shop principle," by which it ensures that any other national jurisdiction

³⁶ Council Regulation 1310/97 EC, *supra* note 29.

³⁷ It provides that for a community dimension, the combined annual worldwide revenue of all subsidiaries is more than €2.5 billion; plus at least two subsidiaries have an EU Community-wide revenue of more than €100 million; plus the combined revenue in each of at least three Member States exceeds €100 million; plus in each of at least three of these Member States revenue exceeds €25 million for at least two subsidiaries. ECMR, *supra* note 21, art. 1(3)(a)-(d).

³⁸ See the last sentences of Article 1(2) and Article 1(3) of the ECMR. ECMR, *supra* note 21, art. 1(2)-(3).

³⁹ Many international mergers, whether they are among European companies or not, are still not reported to the Commission because, they do not reach the necessary threshold for Community jurisdiction despite their international character. Therefore, these mergers do not enjoy the one-stop-shop principle and need to be reported to a number of national authorities instead. As mentioned, of all the mergers in Europe that required clearance, the Commission was only notified of about 11%; the rest were reported to one or more national authorities. Merger control in Europe is therefore far from homogeneous and all encompassing. The Commission, in its 2000 Report on the application of the Merger Regulation Thresholds, concluded that too many transactions with significant cross-border effects, and therefore a Community interest, remain outside of the Community's merger control rules. Report from the Commission to the Council on the Application of the Merger Regulation Thresholds COM(2000)399 final, at 2-3 (June 28, 2000), available at <http://europa.eu.int/comm/competition/mergers/review/>. In order to overcome this shortcoming, the Commission suggests a review of the existing revenue thresholds as well as other substantive and procedural rules relating to the control of concentrations, such as the 2/3 rule. It is therefore likely that either the existing thresholds will be lowered or a completely new threshold covering certain cross-border concentrations will be introduced. Such a new threshold would be lower than the existing ones and would either be combined with a modified 2/3 rule or would completely abandon such a rule. The Commission initiated a comprehensive discussion on the thresholds in its Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001)745 final (December 11, 2001), available at <http://europa.eu.int/comm/competition/mergers/review> [hereinafter ECMR Review Green Paper].

within the EC need not be notified of the mergers, no matter how much effect they may have in these jurisdictions. Of course, authorities outside the EC may still have to be notified of a merger but, with just one investigation, the ECMR can grant legal certainty for the whole of Western Europe.⁴⁰ By contrast, under the size-of-the-parties test of the Hart-Scott-Rodino Antitrust Improvement Act of 1976,⁴¹ a merger has to be reported if one party has annual net sales or assets of at least \$10 million worldwide and the other has annual net sales or total assets of at least \$100 million. Not surprisingly, the U.S. authorities receive a much greater number of notifications every year than the Commission.⁴²

The question remains of what happens if a merger qualifies as a concentration within the meaning of ECMR Article 3 but does not have a Community Dimension. If it does not qualify as a concentration, the Commission may investigate the deal under general competition law. This is not the case if a merger qualifies as a concentration but lacks the necessary Community Dimension. For these cases, ECMR Article 22(1) provides that the Commission cannot use its powers under Regulation 17.⁴³ As Regulation 17 is

⁴⁰ It must not be overlooked that the Commission also has jurisdiction in cases where the European Economic Area ("EEA") is concerned. On May 2, 1992, the EEC, the ECSC, and the then twelve Member States of the European Union reached an agreement with the European Free Trade Association ("EFTA") States for the establishment of an EEA that came into force on January 1, 1994 ("EEA-Treaty"). The aim of this agreement was to create a homogeneous economic area in Europe, including the states that had not yet joined the European Union. The agreement also attempted to unify competition law rules. By modeling its own rules on those of the EC Treaty, the EEA-Treaty effectively extended the EU competition rules to the participating EFTA States. Of the remaining EFTA Members, only Liechtenstein, Iceland, and Norway participate in the EEA, with Switzerland abstaining. EEA-Treaty Article 53 was modeled on EC Article 81; EEA-Treaty Article 54 parallels EC Article 82. Most importantly, according to EEA-Treaty Article 57, the rules of the ECMR effectively apply to the EEA. The EEA-Treaty also established its own authority, the EFTA Surveillance Authority ("ESA"), and an EFTA Court. However, whenever trade with the EC is affected to an appreciable extent, the Commission has jurisdiction under the EEA-Treaty (Article 56(1)(c) and 56(3)).

⁴¹ 15 U.S.C. § 18(a) (1994).

⁴² In 2000, the Commission reviewed 345 mergers, while its Washington counterparts reviewed 4926. Jean Eaglesham & Francesco Guerrera, *Brussels Tougher Than U.S. on Merger Control*, FIN. TIMES, Jan. 9, 2002, at 9. During this time, the national authorities within the EU received 3021 notifications.

⁴³ See First Regulation implementing Articles 81 and 82 of the Treaty, 1962 O.J. Sp. Ed. (204/62) 87 [hereinafter Regulation 17] (laying down the procedural rules and powers of the Commission with regard to European competition law).

the tool for the administration of EC Articles 81 and 82, the Commission, in fact, cannot use general competition law enshrined in these provisions to oppose a merger.⁴⁴ This outcome makes sense because the ECMR was intended to be the Commission's only tool for opposing a concentration. To allow a residual competence under general competition law would have negated this principle. It is also crucial that the parties to a merger know within in a short period of time and with a maximum degree of certainty whether or not their plans can be carried out. Allowing residual powers under Articles EC 81 and 82, which have no time limits, would jeopardize this aim.⁴⁵

2.1.2. *Compatibility with the Common Market*

The criteria for determining whether or not a concentration is compatible with the Common Market are laid down in Article 2 ECMR. This provision emphasizes market dominance, usually as evidenced by market share. However, as will be seen, European law does not focus on market share alone. European law also considers other factors and criteria that allow the Commission significant room for flexibility.⁴⁶ In effect, the distinction between the

⁴⁴ When questioning why the ECMR chose to discontinue applying Regulation 17 rather than, as was clearly intended, EC Articles 81 and 82, one must not forget that as secondary legislation, the ECMR could not stop applying a piece of primary legislation such as EC Articles 81 and 82. Hence, it took the detour of rendering the implementing legislation inapplicable, which brought about the same effect.

⁴⁵ There are, however, some general residual powers of the Commission that can overcome this principle to some extent. Under EC Article 85, the Commission can still investigate a concentration under the principles of EC Articles 81 and 82 and propose (and ultimately authorize) appropriate measures by which the Member States can overcome these infringements. Hence, the Commission retains some kind of oversight role which, through the assistance of the Member States, it can use to exercise general competition jurisdiction even in cases where the direct application of EC Articles 81 and 82 is barred. Aware of the obvious repercussions this possibility offers, the Commission has stated that it would regularly refrain from using this power and, in fact, has yet to use it.

⁴⁶ See Sergio Baches Opi, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation?*, 6 J. TRANSNAT. L. & POL'Y 223, 273 (1997) (arguing that the "commission should, in its merger analysis, equally consider both industrial policy concerns and strict competition-based factors"); Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 850 (1999) ("The Commission has used [the] 'significant impediment' test to add some flexibility in the merger analysis . . .").

U.S. and the European systems is not as large as the classification of the ECMR as a market dominance system would suggest.⁴⁷

2.1.2.1. *The Material Test: Creation or Strengthening of Dominance in the Relevant Markets*

The ways in which the European and U.S. authorities define the relevant markets do not vary much from each other:⁴⁸ the Commission describes the relevant product market as comprising "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."⁴⁹ The relevant product market thus includes those products and services that a significant number of consumers would accept as a substitute if the price of the original product were increased ("demand-side substitution").⁵⁰ If this price increase prompts consum-

⁴⁷ Cf. ECMR Review Green Paper, *supra* note 39, ¶162 ("[T]he vast majority of cases dealt with by the Commission and other major jurisdictions using the SLC-test have revealed a significant degree of convergence in the approach to merger analysis."); Briggs & Rosenblatt, *supra* note 13, at 26 (suggesting "that the conflict has been overdrawn and that while there are certainly differences in the two jurisdictions' enabling statutes that yield modest but noticeable differences in law and policy, the [differences] need not cause lasting conflict between the two anti-trust regimes").

⁴⁸ Cf. Thomas Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 329 (2000) (noting that there is little difference between market definition under the European Merger Regulation and the Clayton Act); David Snyder, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body?*, 29 LAW & POL'Y INT'L BUS. 115, 125-26 (1997) (noting that in both the United States and the European Community Commission, the determination of the relevant market depends on "demand-side substitutability").

⁴⁹ Commission Regulation 447/98 of 1 March 1998 on the Notifications, Time Limits, and Hearings Provided for in Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, Section 5, 1998 O.J. (L 61) 1, 18 [hereinafter Form CO]. See also Case 27/76, *United Brands Co. & United Brands Continental BV v. Commission*, 1978 E.C.R. 207, 226 [hereinafter *United Brands*] (defining the relevant product market as all fresh fruits because bananas are reasonably interchangeable with apples, oranges, and strawberries); Case 6/72, *Europemballage Corp. & Continental Can Co. v. Commission*, 1973 E.C.R. 215, 234 [hereinafter *Continental Can*] (noting that the relevant product market is determined by a product's interchangeability with other products).

⁵⁰ The degree of price increases the European Commission used in the so called SSNIP Test (Small but Significant Non-transitory Increase in Price Test) is 5% to 10%. Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, 1997 O.J. (C 372) 5. See also Horizontal Merger Guidelines 1992, at 1.11, available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (Apr. 2, 1992) [hereinafter *Horizontal*].

ers to purchase a large enough amount of another product instead, then both products are considered to be part of the same product market. In some cases the market may also be considered from the supply side. If, on short notice, a supplier is able to switch its production to supply another good or service to meet demand when prices rise significantly, the alternative product is to be considered part of the same product market ("supply-side substitution").⁵¹ Similarly, in the United States, the relevant product market is defined by reference to demand-side substitution.⁵²

The Commission first defines the relevant geographic market as the areas where the parties to the merger are active.⁵³ A secondary definition is provided by the area in which the above-mentioned substitution could take place: where the conditions of competition are sufficiently homogeneous and can be distinguished from neighboring areas because conditions there are considerably different.⁵⁴ In the United States, the geographic market is defined as the area in which the seller operates and to which buyers can practicably turn for supplies.⁵⁵

With regard to the material test for whether a merger will be allowed, ECMR Article 2(2) states that a concentration which *does not* create or strengthen market dominance (hence "MD test"), whereby effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared

Merger Guidelines 1992] ("The Agency at times may use a price increase that is larger or smaller than five percent.").

⁵¹ Case 6/72, *Continental Can*, *supra* note 49, at 248.

⁵² See *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 481-82 (1992) (stating that the relevant market for antitrust purposes is determined by the "commercial realities" faced by consumers); Horizontal Merger Guidelines 1992, *supra* note 50, at 1.1 ("[T]he Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products likely would impose at least 'a small but significant and nontransitory' increase in price.").

⁵³ Case IV/3151, *Magill TV Guide/ITP, BBC and RTE v. Commission*, 1989 O.J. (L 78) 43; Case IV/29877, *British Telecomm. v. Commission*, 1982 O.J. (L 360) 36.

⁵⁴ Case IV/M.1069, *WorldCom/MCI v. Commission*, 1999 O.J. (L 116) 1, para. 802.

⁵⁵ Horizontal Merger Guidelines 1992, *supra* note 50, at 1.2. See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (noting that the relevant geographic market is determined by the area where the seller operates and the buyer can turn for supplies); *T. Harris Young & Assoc. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991) ("The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded.").

compatible with the common market. In contrast, Article 2(3) ECMR, as a quasi-mirror image to ECMR Article 2(2),⁵⁶ prescribes that a concentration which *does* create or strengthen a dominant position whereby effective competition would be significantly impeded in the common market or in a substantial part of it, shall be declared *incompatible* with the common market. It is in this substantive test that European merger control differs significantly from its U.S. counterpart: U.S. law asks whether a merger will *substantially lessen competition* ("SLC test").⁵⁷

The different approach to what seems to be an identical problem is the result of different historical development in Europe and the United States. Rather than engaging in a long historical tractate on the history of competition law in general and merger control in particular, for the purpose of this Article it suffices to state that current European merger control is to a large extent based on the German concept of competition law and German law, in turn, has been largely influenced by the so-called ordoliberal schools of thought.⁵⁸ Originally, it was believed that every individual should enjoy economic freedom as part of his political freedom and that, therefore, competition should be completely free from any form of government interference.⁵⁹ However, this belief was based on the assumption that individuals competed with one another⁶⁰ – as was the case in the early- to mid-eighteenth century. The Industrial Revolution in the late-nineteenth century brought this situation to an end because the market became more and more the playing field of large entities. These entities sometimes became so strong that competitors were driven out of the market and effective com-

⁵⁶ It is surprising that both provisions were adopted since one or the other alone would have sufficed.

⁵⁷ Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1994)).

⁵⁸ DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE – PROTECTING PROMETHEUS 232-66 (2001) [hereinafter PROMETHEUS]; David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994).

⁵⁹ Gerber, AM. J. COMP. L., *supra* note 58, at 36; Barry Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 COLUM. J. EUR. L. 289, 293 (2000). See also ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell et al. eds, Oxford Univ. Press 1976) (1776) (arguing that the competitive interaction of free individuals seeking personal gain produces wealth).

⁶⁰ PROMETHEUS, *supra* note 58, at 23.

petition was eliminated.⁶¹ German ordoliberalism therefore propagated a system where the market players would freely compete with each other, while the State would guarantee and provide for an order or constitution according to which such competition is and remains possible. Part of this order is the control and restriction of overly powerful single entities.⁶² This approach was adopted in Germany after World War II in its first competition law.⁶³ This competition law and thinking later also found their way into the ECMR.⁶⁴ Based on the idea of an order where competitors should be protected from overwhelming players, both the German⁶⁵ and the European system ask whether or not a merger will lead to the creation of a dominant position.

Interestingly, and quite contrary to its later development, the original development in the United States was not very different from that in Europe. In America, concerns also grew about the rising power of giant combinations called trusts—Standard Oil being one of the most prominent among them.⁶⁶ The Sherman Act

⁶¹ Another danger to competition was the increasing formation of cartels as a response to the economic crises in the late eighteenth century.

⁶² Donna Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18, 20 (2001), argue that the European caution towards large entities "appears dangerously close to the . . . 'Big is Bad' doctrine from the 1960s" and has no sound economic basis.

⁶³ For an overview of the development of German competition law and its relation to the ordoliberal school of thought, see PROMETHEUS, *supra* note 58, at 266-94.

⁶⁴ To a large extent, today's European antitrust policy is based on the German model. See David Gerber, AM. J. COMP. L., *supra* note 58, at 71-74; Rodger, *supra* note 59, at 306. One consequence of this influence has been the prominent role of German competition lawyers in the administration of European competition law. After the establishment of the EC, the Directorate General responsible for Competition has been led primarily by a German national: of the six Directors General since 1958, five have been German. The last German to hold this post, Alexander Schaub, will soon be moved from his post as part of a general rotation of high level officials who have held the post for more than seven years. In a departure from German dominance, he is likely to be succeeded by an Englishman.

⁶⁵ Section 36(1) of the Restraints Against Competition Act ("GWB") states that a merger has to be prohibited if it can be expected to create or strengthen a dominant position. Uniquely, the GWB gives clear levels of market share above which one or several competitors are deemed to be dominant, i.e., one-third for one competitor, one-half for three or fewer competitors, and two-thirds for five or fewer competitors.

⁶⁶ See generally *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30-46 (1910).

was enacted in response to these concerns.⁶⁷ Hence, and in contrast to the European model, U.S. law focuses on the structure of the market by asking if the merger, independent of whether or not it creates a dominant position of a single entity, will lead to a demise in competition in that market.⁶⁸ In U.S. antitrust law the position of the individual entity is only considered as evidence of the concentration of the market. Market concentration is the starting point in a merger control investigation in the United States⁶⁹—just like the Market Dominance of one competitor is the starting consideration in Europe—and then the anticompetitive effect of a merger is analyzed. Although in many instances, both tests should arrive at the same result, it is possible that the same merger could be illegal in Europe and perfectly legal in the United States or vice versa.⁷⁰

Not surprisingly, the schism between the different systems of merger control is not limited to the EU and the United States. Rather it can be seen all over the world with countries, depending on their historical and political affiliation, basically following one system or the other. The SLC test has been adopted in Australia,⁷¹

⁶⁷ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 463 (2d ed. 1985) (stating that the act was in response only to trusts). However, merger control was soon regulated by a special instrument: the Clayton Act. See *supra* note 57.

⁶⁸ Kauper, *supra* note 48, at 320; Stock, *supra* note 46, at 833.

⁶⁹ The 1992 Horizontal Merger Guidelines assess concentration in accordance with the Hirschman-Herfindahl Index ("HHI"). The HHI examines the relationship between the number of competitors and their respective market share in order to determine how concentrated a market is and what change in the index will occur through a merger. The HHI is calculated by summing the squares of the market shares of each firm in the market. A market dominated by few competitors with high market shares leads to a high HHI, indicating a highly concentrated market, whereas many competitors with relatively small market shares will lead to a low HHI, indicating a low level of concentration. The Guidelines create a presumption of illegality in cases where the HHI is increased by more than 100 points in markets of 1800 and above, or legality if the HHI is below 1000, or between 1000 and 1800 and the increase is less than 100. Horizontal Merger Guidelines 1992, *supra* note 50, at 1.51.

⁷⁰ Under the SLC test a merger may be illegal even though—in European terms—it does not create or strengthen a dominant position. Conversely, the SLC test may let a merger proceed even though, in terms of European law, a dominant position is gained.

⁷¹ Trade Practices Act, 1974, c. 50 (Austl.) (as amended 1993).

New Zealand (which only very recently moved from a MD to a SLC test),⁷² Canada,⁷³ and South Africa.⁷⁴ In the United Kingdom, the legality of a merger is currently decided with regard to possible *detriment to the public interest*,⁷⁵ although in practice, the overwhelming majority of cases are decided, as in the United States, on competition grounds.⁷⁶ The current U.K. system is scheduled to be properly replaced by a U.S.-style SLC test.⁷⁷ In contrast, most of the other European national systems have been brought in line with the ECMR and follow the MD approach.⁷⁸ The same is true for most countries that are in line for membership to the European Union.⁷⁹

2.1.2.1.1. Market Share

The ECMR (or for that matter any other EC document) does not contain a clear-cut definition of what constitutes a dominant position. For its assessment, the Commission relies on the established case law of the Court of Justice of the European Communities ("ECJ") and EC Article 82 which prohibits the abuse of a dominant position⁸⁰ and thus parallels Section 2 of the Sherman Act.⁸¹ Ac-

⁷² Commerce Act, 1986, c. 47, amended by Commerce Amendment Act (No. 2), 2001 (N.Z.).

⁷³ Competition Act, R.S.C., ch. C-34, § 92 (1985) (Can.).

⁷⁴ § 12A of the Competition Act 89 of 1998.

⁷⁵ Fair Trading Act, 1973, c. 84 (Eng.).

⁷⁶ WHISH, *supra* note 22, at 730.

⁷⁷ See U.K. Department of Trade and Industry, *Mergers: A Consultation Document on Proposals for Reform* (1999), available at <http://www.dti.gov.uk.cp/mergercon/> (discussing governance proposals for reform of the merger regime); U.K. Department of Trade and Industry, *Mergers: The Response to the Consultation on Proposals for Reform* (Oct. 2000), available at <http://www.dti.gov.uk.cp/mergers/>. A similar step is contemplated in the Republic of Ireland.

⁷⁸ Italy, the Netherlands, Finland, and Sweden follow the European approach as well. France combines the U.S. and European approaches by asking whether the concentration will negatively affect competition, particularly by creating or reinforcing a dominant position. See Law No. 2001-420 of May 15, 2001, J.O. May 16, 2001 p. 7776, art. 92 (inserting Article L 430-6 to the Commercial Code), available at http://www.legifrance.gouv.fr/html/frame_codes1.htm.

⁷⁹ ECMR Review Green Paper, *supra* note 39, para. 161.

⁸⁰ Opi, *supra* note 46, at 272; Stock, *supra* note 46, at 845.

⁸¹ This parallel must not be overemphasized since Section 2 of the Sherman Act requires a monopoly, whereas EC Article 82 lets a dominant position suffice. Cf. Kauper, *supra* note 48, at 321 ("The threshold for finding a dominant position under [current Article 82] may be significantly lower than the measures of monopoly power under section two of the Sherman Act.").

cording to the ECJ, the test to determine a dominant position is whether the economic strength enjoyed by an undertaking enables it to "prevent effective competition being maintained on the relevant market by affording it the power to behave, to an appreciable extent, independently of its competitors, customers, and ultimately its consumers."⁸² This adoption of EC Article 82 is not without problems because the case law of the ECJ regarding this provision deals with the *existing position* of an undertaking in the market and whether or not this position is dominant and being abused. In contrast, the merger investigation is concerned with the position that arises *through* a merger and the question of whether it will create or strengthen a dominant position. Since it is not known how a proposed merger will actually evolve, this assessment necessarily involves a large degree of speculation.⁸³

The most important factor, but by no means the only one, in determining whether or not a dominant position exists, is market share. In order to determine whether a merger should proceed, the Commission must consider the market share that would be created by the merger. Again, neither under EC Article 82 nor in the ECMR are there hard and fast rules for the level of market share the Commission uses to identify market dominance.⁸⁴ The ECMR itself states that a combined market share of 25% should, in all likelihood, not impede effective competition⁸⁵ and is thus to be regarded as compatible with the Common Market. In a number of cases the Commission held that market shares between 50% and

⁸² *United Brands*, *supra* note 49, at 286. The court used the same formula in Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, 1979 E.C.R. 461 (1979) [hereinafter *Hoffmann-La Roche*].

⁸³ *Cf. Baker*, *supra* note 1, at 579. This is also true for the SLC approach and reflects the general situation of merger control which is based on an ex-ante appraisal.

⁸⁴ In comparison, for example, German merger control rules provide for a rebuttable presumption of dominance if one competitor has a market share of more than one-third, or two or three competitors have a share of more than one half, or four or five have a two-thirds market share. In the United Kingdom, an undertaking with a market share of more than one half is presumed to be dominant. *Cf. Monti*, *supra* note 12, at 3 (noting that the EU Commission does not use any particular concentration ratio to establish presumptions).

⁸⁵ ECMR, *supra* note 21, no. 15, pmb1. Apart from the fact that the wording of this provision seems to suggest that the 25% threshold should not be regarded as a firm threshold, it must also be remembered that the recitals are not legally binding, but rather are merely to be used for interpreting the regulation.

60% were incompatible with the Common Market.⁸⁶ The Commission has also ruled that, under certain circumstances, a share of as low as 44% was incompatible.⁸⁷ On the other hand, the Commission has granted permission to proceed to a company that had a market share of more than 80%.⁸⁸ Over the years, an unofficial and *prima facie* level of 40% market share has been identified as the threshold for dominance.⁸⁹

This emphasis on market share in the assessment of a dominant position is problematic. To begin with, it is questionable whether the market share figures of one company can simply be added to that of another after or because of the merger.⁹⁰ Difficulties in implementing the merger may result in some of this share being lost to competitors. The decision to block a merger could thus quickly be overtaken by events that, *ex post*, render the decision wrong. If the European system were based solely on market share, this would constitute a fatal weakness. However, in almost all cases, market share is only the starting point. The Commission looks at various other factors for establishing market dominance. Market share alone is sufficient to establish market dominance in only a few cases. The most obvious case is a market share of 100%, which would put the incumbent in a position to act completely independently of customers and competitors.

The aforementioned problems have also played a role in the discussion in the United States, where they led to a demise of the importance of the market share of the individual party in analyzing mergers.⁹¹ In 1974, the Supreme Court in *United States v. General Dynamics Corp.* held that the statistical data about the market

⁸⁶ See, e.g., Case IV/M.553, RTL/Veronica/Endemol, 1996 O.J. (L 134) 32; Case IV/M.856, British Telecom/ MCI (II), 1997 O.J. (L 336) 1.

⁸⁷ Case IV/M.754, Anglo American Corp./Lonrho, 1998 O.J. (L 149) 21.

⁸⁸ Case IV/M.042, Alcatel/Telettra, 1991 O.J. (L 122) 48.

⁸⁹ See EUROPEAN COMMISSION, XXIXth REPORT ON COMPETITION POLICY 4-5 (1999); Barry E. Hawk et al., *Recent Developments in EU Merger Control*, 15 ANTITRUST 24 (2001). Interestingly, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963), the Supreme Court found that a 30% market share was sufficient to give rise to the presumption of illegality. The 1992 Horizontal Merger Guidelines assume that adverse unilateral price effects are most likely to occur when the parties to a merger have a market share of at least 35%. Horizontal Merger Guidelines 1992, *supra* note 50, at 2.211.

⁹⁰ Moreover, this type of addition can only be done in cases where the merging parties are active in horizontal markets. Market share necessarily plays a much less prominent role in cases of vertical mergers.

⁹¹ Kauper, *supra* note 48, at 323.

and market shares relied upon by the government were not conclusive indicators of anti-competitive effects⁹²—thus effectively killing the market share presumption for illegality.⁹³ Only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger.

In contrast, the Commission does not regard a high market concentration as a major factor against a merger, although this factor will be taken into account when determining the (relative) strength of an entity, which depends on the number and strength of its competitors. Hence, the Commission may allow a merger that leaves only three competitors active in a market, provided these competitors have a comparable market share. In the United States, such a merger would probably be prohibited as an anti-competitive oligopoly. At the same time, a merger which creates a dominant position within the meaning of European law, might get approval in the United States in a little concentrated market.

2.1.2.1.2. Mandatory Factors

When assessing if a merger is compatible with the Common Market, Article 2(1) ECMR prescribes that the Commission shall take into account the following mandatory factors: (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either inside or outwith the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.⁹⁴

While it seems that ECMR Article 2(1)(b) merely reiterates general concerns of merger control to consider as a matter of course, the factors in (b) are more specific and require careful attention. It

⁹² *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974).

⁹³ Cf. Kauper, *supra* note 48, at 323.

⁹⁴ ECMR, *supra* note 21, art. 2(1).

is not completely clear how these criteria can be applied to the actual decision making process and particularly how they relate to the criterion for establishing the impediment to competition. Since the factors must be considered when appraising compatibility with the Common Market and not merely when assessing the dominant position or the impediment to competition, it would appear that these factors must be applied after the aforementioned criteria are met. However, in practice, these factors are mostly used to establish dominance, as was the case in *GE/Honeywell*.

Previous case law suggests that the Commission has emphasized certain aspects like superior technology,⁹⁵ access to capital,⁹⁶ vertical integration, a well-developed distribution system,⁹⁷ product differentiation,⁹⁸ overall size and strength,⁹⁹ conduct¹⁰⁰ and performance¹⁰¹ and has been less concerned with other aspects. There has also been emphasis on the general structure of the markets involved.¹⁰² This aspect can lead to the result that in one case a figure of market share can be harmless whereas in another case the same figure leads to market dominance,¹⁰³ based on the number of competitors and their market shares.¹⁰⁴ In its decision to establish dominance in *GE/Honeywell*, the Commission went to great lengths in addressing the issues of access to capital, vertical integration, overall size and strength, and previous conduct. As already mentioned, it did not do so under a separate heading, but in its overall assessment, together with the questions of dominance and impediment to competition.

Interesting, and of importance in the case of *GE/Honeywell*, is the issue of the interests of intermediate and ultimate consumers as

⁹⁵ Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission*, 1983 E.C.R. 3461, 3536, 1 C.M.L.R. 282 (1985) [hereinafter *Michelin*]; *United Brands*, *supra* note 49, at 276.

⁹⁶ Case IV/M.6.72R, *Continental Can Co. v. Commission*, 1972 J.O. (L7) 25, [1972] C.M.L.R. D11.

⁹⁷ *Hoffmann-La Roche*, *supra* note 82, at 524; *United Brands*, *supra* note 49, at 276.

⁹⁸ *United Brands*, *supra* note 49, at 276.

⁹⁹ *Michelin*, *supra* note 95, at 3536.

¹⁰⁰ *United Brands*, *supra* note 49, at 277.

¹⁰¹ Commission, Decision IV/F-3/33.708, *British Sugar*, art. 85, 1999 O.J. (L 76) 1.

¹⁰² *Michelin*, *supra* note 95, at 3461.

¹⁰³ *WHISH*, *supra* note 22, at 155f.

¹⁰⁴ See *supra* note 69.

laid down in ECMR Article 2(1)(b). It is often claimed that the consumer's interest is not accorded any weight in EC competition law and it is true that in practice this provision has had no relevance.¹⁰⁵ This does not mean that under European merger control, the interests of the consumer are of no concern to the competition authorities;¹⁰⁶ but it is true that they are not the immediate focus. As discussed above, European merger control aims to prevent entities from becoming dominant or increasing their dominance through a merger. This is a rather strict approach and does not leave much room for considerations not connected with the position of the entities. Consequently, European law also does not provide for consideration of possible efficiencies that can be the result of a merger.¹⁰⁷ This is another huge difference from the United States where the so-called efficiency defense would, under certain circumstances, allow a merger if it leads to improvements (e.g., lower prices for consumers).¹⁰⁸ The lack of an efficiency defense was one of the key (and most vigorous) criticisms against the Commission's

¹⁰⁵ Cf. Heinz F. Löffler, *FKVO Artikel 2*, in 1 KOMMENTAR ZUM DEUTSCHEN UND EUROPÄISCHEN KARTELLRECHT ¶ 165 (Eugen Langen & Hermann-Josef Bunte eds., 9th ed. 2001); Opi, *supra* note 46, at 231 ("Thus despite the Merger Regulation's reference to consumers' interests, in practice, these interests are rarely taken into account.").

¹⁰⁶ Briggs & Rosenblatt, *supra* note 13, at 30.

¹⁰⁷ Cf. Thomas L. Greaney, *Not for Import: Why the EU Should Not Adopt the American Efficiency Defense for Analyzing Merger and Joint Ventures*, 44 ST. LOUIS L.J. 871, 889 (2000). Citing Case IV/M.53, *Aerospatiale-Alenia/de Havilland*, 1991 O.J. (L 334) 42, 4 C.M.L.R. M2 (1992), Case IV/M.469, *MSG Media Services*, 1994 O.J. (L 364) 1, and citing "other Commission decisions" that take efficiency improvements into account "between the lines," Greaney argues that "efficiencies have played a negligible role in European analyses." However, in both *de Havilland* and *MSG*, the Commission did not allow efficiency considerations to change the outcome of the decision if a dominant position is created or strengthened. Cf. Kauper, *supra* note 48, at 350.

¹⁰⁸ DOJ/FTC Merger Guidelines expressly recognize that efficiencies are worthy of strong consideration in approving substantial increases of concentration, and several lower courts have concurred. The U.S. Supreme Court most recently said that the possibility that efficiencies will result from a proposed merger cannot be used as a defense to illegality in Clayton Act Section 7 merger cases. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). Furthermore, the Court has stated that where the effect of a merger "may be substantially to lessen competition [it] is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963). Attempts to pronounce the Supreme Court's reasoning as disproved or outdated minimize the inexorable waxing and waning of the diametrically opposed socioeconomic belief systems through the decades.

position in *GE/Honeywell*.¹⁰⁹ Since the Commission could not have recognized this defense even if it had wanted to, this criticism is directed less against this particular decision and more against the system itself—the criticism being that the system does not provide for an efficiency-defense like U.S. law does.

2.1.2.2. Significant Impediment to Competition

From the wording of ECMR Article 2(2) and (3) it follows that ECMR Article 2 effectively calls for a two-tier test to determine whether or not a merger is compatible with the Common Market: dominant position test and the significant impediment to competition test. It has been argued—mostly by German writers—that the impediment to competition is a natural consequence of the first (and thus only) test of dominant market position, and therefore has no substance of its own.¹¹⁰ The Commission, however, seems to follow a two-tier approach. In *Aerospatiale – Alenia/de Havilland*,¹¹¹ it stated that:

[A] concentration which leads to the creation of a dominant position may however be compatible with the common

¹⁰⁹ Patterson & Shapiro, *supra* note 62, at 21.

¹¹⁰ Löffler, *supra* note 105, ¶¶ 9, 174; Ulrich Immenga, *FKVO Artikel 2*, in KOMMENTAR ZUM EUROPÄISCHEN KARTELLRECHT, ¶ 18 (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 2nd ed., 1997). The Bundeskartellamt also appears to subscribe to this view. See Bundeskartellamt, *Prohibition Criteria in Merger Control-Dominant Position Versus Substantial Lessening of Competition?* (Antitrust Workshop, Discussion Paper, Oct. 8 -9, 2001, available at http://www.bundeskartellamt.de/discussion_papers.html). In contrast, Anglo-Saxon lawyers in Europe favor the existence of a two-tier test that would bring European law closer to U.S. law. See WHISH, *supra* note 22, at 773; BELLAMY & CHILD, *supra* note 30, para. 6-062 (noting that applying the second tier of the test would introduce “a degree of flexibility to the Commission’s appraisal which would be lacking if it were required solely to apply the dominance test”); Stock, *supra* note 46, at 850 (“The commission has used [the] ‘significant impediment test to add some flexibility in the merger analysis’”); C.J. COOK & C.S. KERSE, *EC Merger Control* 128-29 (3d ed. 2000) (“The requirement that the dominant position must significantly impede competition in practice is a two-part composite test, and is a formulation broadly consistent with existing case law under Article 82.”); ALISON JONES & BRENDA SMITH, *EC COMPETITION LAW* 752 (2001) (arguing strongly for a two-tier test). Interestingly, the German government also argued for the existence of a second criterion in the *Kali und Salz* case. E.C.J., Cases C-68/94 & 30/95, *French Republic v. Commission* (Kali und Salz), 1998 E.C.R. I-1375, ¶ 106, [1998] 4 C.M.L.R. 829 (1990) [hereinafter *Kali und Salz*].

¹¹¹ Case IV/M.053, *Aerospatiale-Alenia/de Havilland v. Commission*, 1991 O.J. (L 334) 42, [1992] 4 C.M.L.R. M2.

market within the meaning of Article 2(2) of the Merger Regulation if there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry.¹¹²

In *MCI WorldCom/Sprint*, which was the first U.S. merger stopped from being implemented, the Commission first identified the dominant position and then continued by expressly asking what the impact of the merger would be on competition.¹¹³

The E.C.J also seems to have subscribed to this view. In *Kali und Salz*, the court acknowledged the existence of a second test by saying that:

[T]he introduction of that criterion is intended to ensure that the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.¹¹⁴

Therefore, apart from the question of dominance, the Commission has to address three further aspects. First, it has to establish that competition is negatively affected by the existence of a dominant position. Secondly, a causal link must exist between the negative effect and the dominant position. This approach would bring European law closer to the SLC test applied in U.S. law by emphasizing the actual impact on competition by a merger rather than letting the existence of market dominance decide.¹¹⁵ It would

¹¹² *Id.* para. 53. In other words, the fact that market dominance had been established was not sufficient to prohibit the merger. A similar decision was made in Case IV/M.222, Mannesmann/Hoesch v. Commission, 1993 O.J. (L 114) 34.

¹¹³ *MCI WorldCom/Sprint*, *supra* note 5, para.129-74. The parties had actually argued before the FCC that the merger would have no impact on competition in which case, according to the two-tier approach, the Commission would have cleared the merger. However, the Commission did not accept this argument as it consequently denied clearance.

¹¹⁴ *Kali und Salz*, *supra* note 110, para. 115.

¹¹⁵ One way of bringing both systems closer together, an issue which will be discussed in more detail *infra* at Section 5 of this Article, would thus be for European law to accept or strengthen the second criterion. European law would still not be identical to U.S. law because the requirement of market dominance would still be a high threshold to pass in order to get to the question of impediment to

also give the Commission more flexibility to deal with mergers, since market dominance alone does not automatically render a merger impossible.¹¹⁶ When determining the question of consequences, the Commission, like the U.S. authorities, has more leeway as to which aspects to emphasize (and which to base the decision on). In that respect, European merger control is actually not very different from its U.S. counterpart—the main difference being that the Europeans have to establish market dominance first, without which no merger could be stopped. Thirdly, the impediment to competition must be significant. This introduces a *de minimis* rule that would allow for small infringements and give the Commission yet more flexibility in its decisions.

In the case of *GE/Honeywell*, the question whether the substantive test under the ECMR is one- or two-tiered played, or should have played, an important part. Adhering to the two-tier test, the Commission, after having established market dominance, should have continued by showing that the proposed merger would bring about anti-competitive effects.¹¹⁷ The steps the Commission took in this case were less straight forward: instead of first establishing dominance under one heading and then assessing the question of impediment of competition under another, the Commission addressed both aspects together and also included in its assessment the mandatory factors that will be outlined next.

2.2. The European Merger Control Process

The Commission is the executive authority within the EU and in that role also bears responsibility for all antitrust matters.¹¹⁸ The individual powers of the Commission resemble those of any com-

petition, but it would bring the main substantive tests of both systems closer together. Not surprisingly, it is the Common Lawyers in Europe who advocate the importance of the second criterion because it would bring European law closer to the model applied in the United States and many other Common Law countries.

¹¹⁶ Stock, *supra* note 46, at 850.

¹¹⁷ *GE/Honeywell*, *supra* note 7, para. 341.

¹¹⁸ Within the Commission, it is the Directorate General IV ("DG IV"), or more precisely, the Merger Task Force ("MTF") within DG IV, which conducts merger oversight and which is the authority to which all correspondence should be sent.

petent national authority.¹¹⁹ Under ECMR Article 11, the Commission may request information from the undertakings concerned, from third parties or from national authorities.¹²⁰ Failure to provide the requested information can result in the imposition of fines. Like national competition authorities, the Commission also has wide investigative powers. ECMR Article 13 states that the Commission may examine the books and other records, it may take or demand copies thereof, it may ask for explanations, and, most importantly, it may enter premises, land, and means of transportation of undertakings.¹²¹ In a number of circumstances, the Commission may impose fines on the parties to a merger. The most important instance is if the parties fail to notify the Commission and implement the merger anyway.¹²² Fines may range from €1000 to €50,000 for failure to notify a concentration or for submitting false or misleading information.¹²³ If the parties disregard a decision by the Commission and implement a concentration when it was declared incompatible with the Common Market, the Commission may impose fines of up to 10% of the aggregate revenue of the undertakings concerned.¹²⁴ In the eleven years since the ECMR entered into force, fines have been imposed in only five cases.¹²⁵

¹¹⁹ These powers were modeled after those given to the Commission under general competition law as laid down in Regulation 17. Regulation 17, *supra* note 43.

¹²⁰ For an overview of the procedure of EC competition law, see MARTIN SMITH, *COMPETITION LAW, ENFORCEMENT AND PROCEDURE* (2001).

¹²¹ Article 13 ECMR parallels, almost to the word, Article 14 of Regulation 17.

¹²² Furthermore, fines may be imposed for late notification, and for providing false or misleading information. After the notification process has been finalized, the Commission may also impose fines for breach of any conditions attached to a clearance. Third parties may also be fined if they fail to supply the Commission with requested information.

¹²³ ECMR, *supra* note 21, art. 14(1).

¹²⁴ *Id.* art. 14(2).

¹²⁵ It was not until 1998 that the Commission first imposed a fine under the ECMR. Samsung acquired control over an American firm and failed to notify the Commission, whereupon it was fined €33,000. Commission Decision Imposing Fines for Failing to Notify and for Putting into Effect a Concentration in Breach of Article 4(1) and Article 7(1) of Council Regulation (EEC) No 4064/89, 1999 O.J. (L 225) 12.

For the purpose of the notification, the parties¹²⁶ must¹²⁷ complete and submit Form CO, which is less like a form and more like a very complex series of questions.¹²⁸ Because of the emphasis on market dominance, a substantial part of Form CO is devoted to the market affected.¹²⁹ Parties are asked to define the relevant product and geographical markets, to describe the structure and market entry situation, give information about their own market shares and that of their competitors, explain the degree of vertical integration of the competitors, etc.¹³⁰ This process differs from the U.S. system where the parties for a filing under Hart-Scott-Rodino Act¹³¹ have to submit much less information and, in particular, do not have to concern themselves with the position of competitors.¹³² The information obtained in Form CO helps the Commission to gather the information necessary to make its decision. This also

¹²⁶ It should be noted that according to Article 4(2) ECMR it is generally the responsibility of all of the parties to a merger to jointly notify the Commission. However, in the most common case of a takeover, it is the responsibility of the party acquiring control to notify the Commission. ECMR, *supra* note 21, art. 4(2).

¹²⁷ There are exceptions to this rule. Under Article 21(3) ECMR the Member States may take measures to protect legitimate interests and thereby prevent the filing. For example, the Commission has accepted representations by the U.K. and Italy that their industries were ordered not to notify the Commission of agreements concerning the arms trade. *Id.* art. 21(3).

¹²⁸ Form CO, *supra* note 49, asks very detailed questions regarding the parties involved, the relevant market, the shares of the market players, access of new players, etc. The Commission invites the parties to a merger to contact it to discuss the merger at a very early stage. During these discussions the Commission may waive some of the questions in Form CO, because, for example, it does not consider the information necessary for decision making or it is already aware of the facts. See also European Commission, "Mergers: Best Practice Guidelines," available at http://europa.eu.int/comm/competition/mergers/others/best_practice_gl.html (last visited February 24, 2002) ("[I]t may not be necessary to provide all information specified in Form CO [but] all requests to omit . . . information specified should be discussed . . . with the Merger Task Force beforehand.").

¹²⁹ See Opi, *supra* note 46, at 248.

¹³⁰ In practice, preparing a Form CO questionnaire requires a substantial amount of time and effort, not only (and maybe even less by) lawyers and management, but also by market researchers and economists. It is usual practice that the parties submit drafts of the Form and discuss it with the MTF before submitting the final version.

¹³¹ 15 U.S.C. § 18(a) (1994).

¹³² Under HCR the parties do have to turn over documents analyzing markets, market share, etc., and do have to provide information on the products, to which the government gives specified codes. This lets the government take a first cut at calculating concentrations. *Id.*

poses a considerable degree of ambiguity, since this initial material is provided by the parties and not by independent bodies.¹³³

EC merger control provides for pre-merger notification, that is, the merger must not be implemented before it has received clearance from the Commission.¹³⁴ After receiving notification,¹³⁵ the Commission has one month for a first assessment, to investigate the merger. This period may, under certain circumstances, be ex-

¹³³ This does not mean that this information is not checked and supplemented by independent sources. However, it has been criticized in that unlike the United States DOJ and Federal Trade Commission, the Commission does not have sufficient input from economists, especially in-house. See Professor Carl Shapiro's comments in *Roundtable Discussion*, 16 ANTITRUST 7, 17 (2001) [hereinafter *Roundtable Discussion*].

¹³⁴ The Commission has set out the details of the notification process as well as the questions of hearings prior to the decision in a regulation. Commission Regulation (EC) 447/98, 1998 O.J. (L 061) 1. A number of mergers appear to have no impact on the markets concerned. This is either because the parties have not been active in the same markets before, or because their combined market share is so minute that no negative effect is expected. Under these circumstances it would be inappropriate to apply the same strict rules as those used for complex mergers. In view of this, the Commission has devised a simplified procedure for routine concentrations that came into force since September 1, 2000. Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under Council Regulation 4064/89 EEC of 29 July 2000, 2000 O.J. (C 217) 32. The simplified procedure will be applied to concentrations where two or more undertakings acquire joint control of a joint venture, where none of the parties to a concentration are engaged in business activities in the same product and geographical market or where the combined market share is not 15% or more for horizontal and 25% for vertical relationships. Additionally, the revenue of the joint venture and/or the revenue of the contributed activities must be less than €100 million in the European Economic Area ("EEA") territory and the total value of assets transferred to the Joint Venture must be less than €100 million in the EEA territory. If the Commission is satisfied that the concentration qualifies for the simplified procedure, it will normally issue a short-form decision. The concentration will thus be declared compatible with the Common Market within one month of the notification. However, if the Commission finds that the notified merger should be investigated in depth, the Commission has the option to revert into a normal Phase I procedure. Between September 2000 and April 2001, some 216 mergers were notified to the Commission under the ECMR. About 39% of these were considered to fall under the provisions of the simplified treatment procedure. The average duration from notification to clearance in these cases was twenty-five calendar days. See ECMR Review Green Paper, *supra* note 39, para. 175.

¹³⁵ According to Article 4(1) ECMR, the Commission must be notified of the merger not more than one week *after the conclusion* of the agreement, which means that the parties must have a binding agreement in their hands when filing the notification. However, it is standard practice—and encouraged—to seek contact with the Commission at a much earlier stage in order to discuss pertinent details of the merger and try to resolve problematic issues before formal notification.

tended.¹³⁶ At the end of this stage ("Phase I"), the Commission must either declare the merger to be compatible with the Common Market (Article 6(1)(b) decision) or, if it finds that it has serious doubts that the merger is compatible with the Common Market, it may open an in-depth investigation (Article 6(1)(c) decision),¹³⁷ for which it has another four months ("Phase II").¹³⁸ Only about 5% of all notifications reach this stage. At the end of Phase II, the Commission must declare the merger compatible (Article 8(2) decision)¹³⁹ or incompatible (Article 8(3) decision) with the Common Market. If the Commission fails to make any decision after Phase I or, if applicable, after Phase II, the merger is deemed to be compatible with the Common Market (ECMR Article 10(6)). It is important to recognize that the time limits for evaluating mergers may be extended or may not even begin to run if the parties submit incomplete¹⁴⁰ or incorrect information,¹⁴¹ or if the Commission requests substantial additional information.

Unlike the U.S. system, where the authorities have to take the parties of a proposed merger to court to stop it, the Commission's decision has the power of an administrative act¹⁴²—as it is the deci-

¹³⁶ Where undertakings are given by the parties, the time period in which the Commission must complete Phase I is extended from one month to six weeks. See ECMR, *supra* note 21, art. 10(1) (noting that the period in which the commission is to make its decision is extended to six weeks where a Member State submits a request to the commission).

¹³⁷ With an Article 6(1)(a) decision, the Commission finds that the concentration does not fall within the scope of the ECMR. *Id.* art. 6(1)(a).

¹³⁸ If an in-depth investigation is launched, the entire process can last five months.

¹³⁹ The approval of the merger can also be subjected to conditions and obligations. *Id.* art. 6(2) (Conditions & Obligations) decision.

¹⁴⁰ If a notification is incomplete, there is also the possibility that the periods do not even start to run, since only a completed Form CO triggers the beginning of the one-four month time period. In the last two years notifications have been declared incomplete by the Commission for basically three reasons: (a) technical impossibility of receiving the notification, (b) inadequacy of the information provided, and (c) non-identification of the potential markets by the notifying parties. In 1997, 17 cases out of 172 notifications were declared incomplete. In 1998, 17 out of 196 cases were declared incomplete.

¹⁴¹ For this the parties also face fines. See ECMR, *supra* note 21, art. 14 (explaining that the commission may impose fines of up to €50 thousand where persons have negligently or intentionally provided incomplete or incorrect information).

¹⁴² According to the ECJ, the Commission is not a tribunal in the sense of Article 6 of the European Convention on Human Rights ("ECHR"). Joined Cases 100-103/80, SA Musique Diffusion Française v. Commission, 1983 E.C.R. 1825.

sion of a national European authority. The Commission thus acts as both investigator and decision-making body. Its act is subject to judicial review. The merger control process is therefore less forensic and less visible to the general public than it is in the United States with its emphasis on court procedure.¹⁴³ The question of a possible appeal against the Commission's decision was an issue in the battle of words between the United States and Europe. In *GE/Honeywell*, the American side argued that the right to appeal in Europe is less comprehensive than it is in the United States and that GE and Honeywell were thus effectively prevented from pursuing their case beyond the Commission.¹⁴⁴ While it is certainly true (and not surprising) that the appeals process in both systems differs,¹⁴⁵ it cannot be said that there is no effective appeals process in Europe.¹⁴⁶ The notifying parties may appeal to the European Court of Justice ("ECJ") if they are dissatisfied with the decision of

¹⁴³ It must be observed that despite this characteristic experience shows that many cases in the United States are settled out of court or abandoned by the parties. It could thus correctly be argued that the merger policy in both systems is, in effect, almost exclusively in the hands of the enforcement agencies. See Kauper, *supra* note 48, at 317.

¹⁴⁴ Cf. Patterson & Shapiro, *supra* note 62, at 22 (arguing that the available right to appeal the Commission's decision to the CFI "does not provide the same discipline in the review process as the requirement in the United States system that antitrust agencies obtain a court order enjoining the consummation of the transaction").

¹⁴⁵ To start, the European legal and judicial system is largely based on French law and the French court system, which is very different from the Anglo-Saxon common law system in terms of both substantive law and the administration of justice. One of the most important differences between the systems is that European law has no rule of precedent; its decisions thus do not create law but merely interpret statutes. However, like in other continental European systems, and for the sake of predictability and legal certainty, the Court strives for consistency and only on rare occasions reverses previous positions. See, e.g., Joined Cases C-267/91 & 268/91, Criminal Proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097 [1990], [1995] 1 C.M.L.R. 101 (1995). But see Patterson & Shapiro, *supra* note 62, at 22 (arguing that it appears that at least the Commission's decisions have no force or effect similar to a U.S. court decision).

¹⁴⁶ See Joined Cases 100-103/80, *Musique Diffusion Française v. Commission*, 1983 E.C.R. 1825; Case T-348/94, *Enso Española SA v. Commission*, 1998 E.C.R. II-1875 [1998]. It is also not true that the Court will always follow the Commission as is evidenced by the strong language the E.C.J. used to squash the Commission's decision in *Kali und Salz*. *Kali und Salz*, *supra* note 110. See also Monti, *supra* note 12, at 14 (noting that a large percentage of merger prohibitions by the Commission have been scrutinized by the courts and that this scrutiny ensures a Commission will make a decision that will hold up under examination). See also Francisco-Enrique Gonzalez-Diaz's comments in *Roundtable Discussion*, *supra* note 133, at 13.

the Commission (denied merger clearance or imposition of fines).¹⁴⁷ Merger (as well as other competition law) cases are handled first by the European Court of First Instance ("CFI").¹⁴⁸ An appeal against a decision of the CFI, on points of law only, is made to the ECJ. However, unless the Court specifically decides so, this appeal does not automatically suspend the merger.¹⁴⁹

Competitors of the notifying parties may also challenge a decision of the Commission to clear a concentration before the CFI under Article 230 EC.¹⁵⁰ However, this private enforcement of anti-trust law is comparatively rare in Europe.¹⁵¹

¹⁴⁷ Competitors also have the possibility of lodging a complaint with the Commission before it has made its final decision. These complaints are most likely to express concerns about the proposed concentration. No specific form is prescribed; however, the Commission has drafted Form C, which can be used as a template. 1993 O.J. (L 336) 25.

¹⁴⁸ Before the CFI was established in 1988, all cases went directly to the ECJ.

¹⁴⁹ Statute of the Court of Justice, Protocol on the Statute of the Court of Justice of the European Economic Community, Art. 53, Apr. 17, 1957, 298 U.N.T.S. 147 (1958), amended by Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 6 III(3)(c), 1997 O.J. (C 340) 1. at <http://europa.eu.int/cj/en/txts/acting/statut.htm>.

¹⁵⁰ According to this provision, any natural or legal person may institute proceedings against a decision that is of direct and individual concern. The Courts have taken a broad view as to who qualifies as a concerned party under competition law. See Case 25/62, *Plaumann & Co. v. Commission*, 1963 E.C.R. 95, 124, [1964] 3 C.M.L.R. 29 (1963) (broadly construing the term "person" in Article 173(2) of the E.E.C. Treaty to include Member States); Case 75/84, *Metro-SB-Grossmärkte GmbH & Co KG v. Commission*, 1986 E.C.R. 3021, 3080, [1987] 1 C.M.L.R. 118 (1986) (articulating when a third party is directly and individually concerned by a Commission decision); Cases T-528/93, T-542/93, T-543/93, T-546/93, *Métropole Télévision SA v. Commission*, 1996 E.C.R. 1851, 1871, [1996] 5 C.M.L.R. 386 (1996) (finding some of the third party competitor applications admissible and others inadmissible).

¹⁵¹ "In the United States, most enforcement is done at the private party level, largely because, unlike in Europe, juries decide damages, and in the area of anti-trust, treble damages apply." Shanker A. Singham, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L L. 363, 389 (1998). In Europe, the ECJ cannot award damages to third parties; therefore, damages would have to be sought, if at all, in the national courts. It is still debated whether or not the laws of the Member States must give redress to individuals whose rights have been infringed under Community law. The ECJ has stated that national courts must ensure that remedies are available to individuals, which are sufficient to ensure real and effective protection of their community rights. In the case of *Francovich v. Italy*, Cases C-6/90 & 9/90, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1991), the ECJ decided that a Member State must make reparation for losses arising in consequence of the Member State's breach of Community Law. European law thus acknowledges a claim in vertical violations. So far,

Until now, the Commission has actually prevented very few mergers.¹⁵² However, this result is not necessarily due to the fact that the mergers would, in the view of the Commission, not have led to a dominant position. Rather, and similar to the situation in the United States, in many cases, the parties, after negotiations with the Commission, undertook to disperse of parts of their businesses in order to overcome concerns that had been raised during these discussions. This was particularly the case in the U.S. mergers of AOL and Time Warner¹⁵³ and Boeing and McDonnell Douglas.¹⁵⁴ This tactic also played a major role in the *GE/Honeywell* case in which GE offered to divest a substantial part of its financing activity in order to meet the Commission's concerns.¹⁵⁵

Unlike the United States,¹⁵⁶ the Commission cannot observe the subsequent behavior of the parties *under merger control rules* and

English Courts, for example, have not awarded damages for infringements of EC Articles 81 and 82. In early February 2002, the Commercial Court in London was about to hear the first action of its kind in *Yehekel Arkin v. Borchard Lines, Ltd.* for breach of EC Articles 81 and 82. Damages were awarded, however, in Germany (OLG Düsseldorf, - *Metro/Cartier*, 40 WIRTSCHAFT UND WETTBEWERB 141 (1988), WuW/E OLG 4407) and in France (CA Paris, 4e ch., Mar. 23, 1989 (*Euro Garage v. Renault*)).

¹⁵² Before the decision in *GE/Honeywell*, the latest decision was taken on January 31, 2001 in Case COMP/M.2097, *SCA/Metsä Tissue v. Commission* (2001), available at http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_41.html#m_2097, and that was only the fourteenth instance since the entry into force of the ECMR in 1990 where the Commission stopped a merger from going through. Three mergers were prohibited after *GE/Honeywell*, bringing the total number to 18. These cases are Case COMP/M.2283, *Schneider/Legrand v. Commission*, see Press Release, Commission Prohibits Acquisition of Control of Legrand by Schneider Electric (Oct. 10, 2001), available at http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_45.html#m_2283; Case COMP/M.2187, *CVC/Lenzig v. Commission* (2001), available at http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_43.html#m_2187; Case COMP/M.2416, *Tetra Laval/Sidel v. Commission* (2001), available at http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_48.html#m_2416. This means that well over a quarter of all prohibitions under the ECMR since 1990 were decided in 2001. It must not be overlooked that in a large number of cases the parties agreed to certain undertakings (e.g., to dispose of parts of their business) and thus avoided a negative decision by the Commission.

¹⁵³ See *infra* Section 3.2.

¹⁵⁴ See *infra* Section 3.1.

¹⁵⁵ See *infra* Section 4.

¹⁵⁶ In *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957), the Supreme Court held that the legality of a merger or acquisition under Section 7 of the Clayton Act is determined as of the time of the suit rather than at the time of the stock or asset acquisition. See also *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 241-42 (1975) ("[A]cquisition under § 7 is not a discrete transaction

intervene if the merger later turns out to be anti-competitive.¹⁵⁷ The Commission can do so "only" under general competition law. At first glance, this provides an effective tool to address anti-competitive behavior. However, a general competition investigation is very time consuming. Instead of a merger investigation, an Article 82 EC investigation was suggested to address the Commission's concern about possible bundling. Such an investigation can take information about the actual behavior of a party into account, whereas a merger control investigation that takes place before such behavior may well be based on speculation.

2.3. Extraterritorial Application of EC Merger Control Rules

One of the most frequently asked questions regarding the GE/Honeywell merger is how and why a non-United States body like the Commission can assume jurisdiction in a case that solely involves U.S. companies, which will take place on American soil, and which has already received the blessing of the competent U.S. authority ("How dare they?").

The ECMR, like any other national regime, aims to protect its home markets from distortions, rather than concern itself with the state of the world's market in general.¹⁵⁸ In many cases, distortions of the Common Market come from within the market itself, e.g., when two or more companies from one or more Member States merge or take over one another and thus create a dominant position within the Common Market. However, it is also possible that a merger transacted outside Europe has an impact on the Common Market. Subjecting these "foreign" mergers to European jurisdiction poses problems of public international law because, as a rule, a state should not pass judgment upon acts that take place in another state since doing so is the sovereign right of the state in which the

but a status which continues until the transaction is undone."); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505 (1974). There is a statute of limitations here that may limit the government's ability to challenge a merger itself at a later date.

¹⁵⁷ Mario Monti admitted that this was a notable difference between the European and the U.S. systems: "We have a one shot possibility to approve or block a merger." Phillip Shishkin, *EU Makes It Official: No Honeywell for GE*, WALL ST. J. EUR., July 4, 2001, at 1.

¹⁵⁸ This narrow view appears to have received some new thinking. See, e.g., Fox, *supra* note 1, at 3. See also discussion *infra* Section 5 of this Article.

act occurs.¹⁵⁹ However, it is generally acknowledged that this comity principle is not legally binding but rather *adhortative*, calling upon the deference and good will of the states involved.¹⁶⁰

In the United States, the possible application of the Sherman Act in defiance of the comity principle to non-nationals who are engaged in anti-competitive behavior outside the United States was outlined in 1945 in *United States v. Aluminum Co. of America* ("Alcoa").¹⁶¹ Judge Learned Hand stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has *consequences within its borders* which the state reprehends . . ."¹⁶² Thus, the *Alcoa* case "laid the foundation for the more extensive application of the Sherman Act to foreign cartels, which was to lead to the first major conflicts over U.S. extraterritorial jurisdiction"¹⁶³ and paved the way for the application of the "effects doctrine" in the United

¹⁵⁹ See *Lotus Case* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 23; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 29 (4th ed. 1990); F.A. MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW*, 111 RECEUIL DE COURS 122 (1964).

¹⁶⁰ *Comitas Gentium* can be translated roughly as friendliness among peoples. See also *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. Ct. App. 1977); L. OPPENHEIM, *INTERNATIONAL LAW* 34 n.1 (8th ed. 1955).

¹⁶¹ 148 F.2d 416, 444 (2d Cir. 1945). See also *Timberlane Lumber Co. v. Bank of Amer.*, 549 F.2d 597, 608-15 (9th Cir. 1976); *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 (1993).

¹⁶² *United States v. Alcoa*, 148 F.2d at 443 (emphasis added). In contrast, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), Justice Oliver Wendell Holmes stated that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

¹⁶³ PETER T. MUCHLINKSI, *MULTINATIONAL ENTERPRISES AND THE LAW* 130 (1995); William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 846 (2001).

States¹⁶⁴ and, later, in other jurisdictions¹⁶⁵ as well as a criterion¹⁶⁶ for overriding the comity principle.¹⁶⁷

In Europe, the ECJ, in its early case law on the matter, originally rejected the idea of an effects doctrine. Instead, the Court took the view that the question must be asked where an agreement is "implemented."¹⁶⁸ If implementation takes place in the Community, it has jurisdiction.¹⁶⁹ Since the difference between "effect" and "implementation" seems to be marginal, it appears that the Community authorities have been applying an effects doctrine in all but name.¹⁷⁰ Recently, the CFI expressly recognized that public international law allows for an effects doctrine, but still adhered to the criterion of "implementation" rather than "effect."¹⁷¹

Many mergers will require notification not only to the Commission, but also to other national competition authorities outside the EU. In order to obtain and supply information from and to other authorities and also in an attempt to avoid inconsistent decisions, the Commission has established a network of co-operation

¹⁶⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1996).

¹⁶⁵ See, e.g., Act Against Restraints of Competition § 130(2) GWB (Germany); Competition Act, 1998 c. 41, § 2(3) (Eng.). In an Aide-mémoire of October 20, 1969 to the Commission, the British government expressed the view that "[A] state should not exercise jurisdiction against a foreigner who, or a foreign company, which has committed no act within its territory." EXTRATERRITORIAL JURISDICTION 144, 146 (A.V. Lowe, ed. 1983).

¹⁶⁶ Snyder, *supra* note 48, at 120-22.

¹⁶⁷ The decision to depart from the comity principle must be a balanced one in terms of the interest of the States involved. See Ernst-Joachim Mestmäcker, *Staatliche Souveränität und offene Märkte*, 52 *Rabels Zeitschrift* 205, 241-49 (1988).

¹⁶⁸ Cases 89/85, 104/85, 114/85, 116-85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, *A. Åhlström Osakeyhtiö v. Commission* (Wood Pulp), 1988 E.C.R. 5193, 5217, [1988] 4 C.M.L.R. 901. Advocate-General Warner had argued for the adoption of "direct, substantial and foreseeable effect," stating that the Community was entitled to use the effects doctrine under public international law. *Id.* at 5227.

¹⁶⁹ The criterion of implementation is satisfied by mere sales within the Community, regardless of the source or location of the sources of supply or production. Case T-102/96, *Gencor Ltd. v. Commission*, 1999 E.C.R. II-753, 784 (1999) [hereinafter *Gencor*].

¹⁷⁰ Cf. WHISH, *supra* note 22, at 400; Roberto, *supra* note 9, at 614; Snyder, *supra* note 48, at 121.

¹⁷¹ *Gencor*, *supra* note 169, at II-785. But see Mestmäcker, *supra* note 167, at 220.

with the competent authorities in other jurisdictions.¹⁷² In *GE/Honeywell*, this played an important role because the Commission was in close contact with its U.S. counterpart from the initial notification to the DOJ and was, allegedly, regularly informed of the investigation process.

3. HISTORY OF COMMISSION DECISIONS PERTAINING TO U.S. COMPANIES

In terms of subjecting U.S. mergers to EC regulations, the decision in *GE/Honeywell* was not the first of its kind. Other decisions preceded *GE/Honeywell* and some attracted similarly big headlines at the time of their investigation/decision.

3.1. *Boeing / McDonnell Douglas*

In February 1997, Boeing and McDonnell Douglas, two U.S. jet manufacturers, notified the Commission of a proposed merger that would eliminate one of the three remaining competitors in the market for large commercial jet aircraft. Although the merger received approval by the FTC¹⁷³ as well as the Commission,¹⁷⁴ this case very clearly illustrated the different approaches taken on the American and European sides of the Atlantic.¹⁷⁵ In Europe, it was largely expected that the Commission would block the merger because it would create market dominance for Boeing, whose share in the market for large jet aircraft would increase from 64% to 70%.¹⁷⁶

¹⁷² Under the 1991 Agreement with the United States (Agreement Between the Government of The United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 1995 O.J. (L 131) 38, corrected at 1995 O.J. (L 131) 38, supplemented by Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, 1998 O.J. (L 173) 28), the Commission will notify the U.S. authorities upon reception of a notification and invite their comments. Cooperation between the authorities is frequent and not limited to individual cases. It is possible that information supplied to one authority will be reviewed by the other. Therefore, before submitting information to one authority, the notifying party should ask itself if the information is consistent with material that has been or will be submitted to another authority.

¹⁷³ Four to one majority decision of July 1, 1997.

¹⁷⁴ *Boeing/McDonnell Douglas*, *supra* note 3.

¹⁷⁵ Kovacic, *supra* note 163, at 851, 863.

¹⁷⁶ In the wide body market it would increase from 71% to 73%; in the narrow body market from 55% to 66%. It was feared that in the segment of smallest nar-

Initially, the FTC concluded that the proposed merger “[o]n its face . . . appears to raise serious antitrust concerns.”¹⁷⁷ However, although it fell short of declaring McDonnell Douglas a failing firm,¹⁷⁸ the FTC believed it was not capable of exercising any influence on the market. It no longer had a chance to receive any orders for a large aircraft and no economically plausible strategy could change this situation.¹⁷⁹

The Commission saw the merger as being more problematic: its concern centered on the already existing dominant position of Boeing, which was about to be strengthened through the acquisition.¹⁸⁰ Although the Commission agreed with the FTC that McDonnell Douglas was no longer as viable a competitor¹⁸¹ as Airbus, it still saw an increase of Boeing’s market power through the acquisition of the now largely impotent competitor. By acquiring McDonnell Douglas, Boeing’s customer base would broaden as it gained access to eighty-five airlines that did not yet operate Boeing aircraft, but either exclusively McDonnell Douglas aircraft or a combination of McDonnell Douglas and Airbus aircraft.¹⁸² The Commission was also concerned about the use of technical know-how from McDonnell Douglas’ military branch for the civilian

row aircraft with 100 to 120 seats, Boeing would, over time, gain a monopoly and a near monopoly in the freighter segment. Boeing/McDonnell Douglas, *supra* note 3, para. 57.

¹⁷⁷ Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Stark, and Christiane A. Varney in the matter of the Boeing Company/McDonnell Douglas Corp., File No. 971-0051, available at <http://www.ftc.gov/opa/1997/9707/boeingsta.htm>.

¹⁷⁸ The failing firm defense was developed by the Supreme Court in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). See also *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969). This principle was also adopted in the 1992 Merger Guidelines. In order to invoke this defense, a firm must show that it is in imminent danger of financial failure, that the alleged failing firm would be unable to reorganize under bankruptcy laws, and that a good faith attempt to sell the firm to an alternative buyer was made but was unsuccessful.

¹⁷⁹ In her statement, Commissioner Azcuenega held that the majority wrongly relied on the so-called *General Dynamics* defense according to which market shares that are based on past performance may overstate a firm’s future competitive significance. In contrast, McDonnell Douglas may need more customers for its products, but having won fewer customers than it might want does not make Douglas unable to compete for future sales. News Release, Statement of Commissioner Mary L. Azcuenega in the Boeing Company, File No. 971-0051, available at <http://www.ftc.gov/opa/1997/9707/ma.htm>.

¹⁸⁰ Boeing/McDonnell Douglas, *supra* note 3, para. 53-112.

¹⁸¹ *Id.* para. 58.

¹⁸² In contrast, of 561 airlines operating worldwide, only 316 use Boeing.

sector.¹⁸³ Another concern was Boeing's capability in terms of exclusive deals it could offer customers, which, in the eyes of the Commission, would be enhanced. Within the existing exclusive deals Boeing had with a number of U.S. airlines, it could now offer McDonnell Douglas aircraft as well as spare parts and support service for older aircraft. It is noteworthy that the Commission observed that the combination of a broader product range, financial resources, and higher capacity—and thus the ability to respond to airlines' needs for deliveries on a short lead-time—would significantly increase Boeing's ability to induce airlines to enter into exclusive deals. Airbus, the only remaining competitor, would not be able to offer such exclusive deals because Airbus is unable to offer a full "family" of aircraft.¹⁸⁴

The merger only received the green light from the Commission after Boeing agreed to a number of significant undertakings, most notably to maintain McDonnell Douglas as an independent company for a period of ten years and to provide customer support for McDonnell Douglas aircraft at the same level provided for Boeing aircraft.¹⁸⁵ Very importantly, Boeing also undertook not to enter into additional exclusive agreements until 2007 and not to exercise its exclusive rights under existing agreements with U.S. carriers.¹⁸⁶

Many observers had expected the Commission to stop the merger between Boeing and McDonnell Douglas,¹⁸⁷ but it seemed at that time that the Commission shied away from the political impact such a decision would have had.¹⁸⁸ This was despite the fact that the Commission was under intense pressure from Boeing's sole competitor, Airbus, and a number of European politicians who saw the chances of Airbus' economical success and survival in

¹⁸³ Boeing/McDonnell Douglas, *supra* note 3, para. 65-67.

¹⁸⁴ *Id.* para. 70.

¹⁸⁵ Boeing would also continue to give support to McDonnell Douglas aircraft if the operator proposed to purchase another manufacturer's aircraft and would not use its position to persuade McDonnell Douglas customers to buy Boeing aircraft. *Id.* para. 115.

¹⁸⁶ *Id.* para. 116.

¹⁸⁷ On July 4, 1997, the fifteen member advisory panel, consisting of the chiefs of the Member States' antitrust enforcement agencies, unanimously recommended that the Commission block the merger. Karel van Miert, then Commissioner for Competition, quickly attained Commission support for this stance. See Stock, *supra* note 46, at 841.

¹⁸⁸ For a comprehensive analysis of this case and the decisions of both the FTC and the Commission, see Kovacic, *supra* note 163.

jeopardy. For the same reason, albeit in relation to Boeing, there was a lot of pressure in the United States to allow the merger.¹⁸⁹

3.2. AOL/Time Warner

Although the merger between the U.S. companies AOL and Time Warner also received approval from both authorities, the differences between European and U.S. merger control also surfaced. In April 2000, the Commission received a notification of a proposed concentration by which Internet provider AOL would merge with Time Warner, Inc., the media giant that counted among its assets CNN, Warner Bros., several publishing companies, as well as music and TV content providers.¹⁹⁰ Although AOL is primarily a provider of Internet services,¹⁹¹ it also offers software, like the Netscape browser. Most importantly, AOL also had close ties with German media giant Bertelsmann,¹⁹² which has a large amount of music and film content at its disposal.

The FTC was concerned that AOL would stop promoting the Digital Subscriber Line ("DSL") technique as an alternative to broadband cable because Time Warner in the United States was the largest broadband cable network and also held a large share in an Internet company which used broadband cable technology.¹⁹³ The FTC therefore aimed at opening Time Warner's cable network for other suppliers of Internet service.

In Europe, neither AOL nor Time Warner had broadband facilities. The Commission was concerned about the *vertical* integration of both companies. Through its merger with Time Warner, AOL, as an Internet service provider would have access to a very attractive package of content.¹⁹⁴ Through its existing ties with

¹⁸⁹ Snyder, *supra* note 48, at 137.

¹⁹⁰ For a comprehensive list of Time Warner's businesses, see AOL/Time Warner, *supra* note 4, para. 12.

¹⁹¹ In fact, AOL commands three Internet Service Providers ("ISP"), AOL, CompuServe, and Netscape Online, with about 27 million subscribers, of which 4.3 million are in Europe.

¹⁹² Bertelsmann owned 50% of AOL Europe, S.A. and had a four-year content agreement with AOL. See AOL/Time Warner, *supra* note 4, paras. 8, 10.

¹⁹³ Baker, *supra* note 1, at 582.

¹⁹⁴ Time Warner also intended to merge its activities with EMI. The three companies, EMI, Time Warner, and Bertelsmann, would have held about 50% of the world's music publishing rights in Europe. See Mario Monti, *European Community Competition Law: European Competition for the 21st Century*, 24 FORDHAM INT'L L.J. 1602, 1610 (2001).

Germany's Bertelsmann AG, it would be possible for the newly-created company to determine the conditions for the online transmission of music, which would enable it to gain a dominant position in the market of online music.¹⁹⁵ The Commission also concluded "that the new entity would become dominant in the market for music software."¹⁹⁶ Here, the Commission thought that the new company could format Time Warner and Bertelsmann music to make it compatible only with Winamp, the AOL software. Winamp is currently the only software to play almost all music on the Internet, including that in other formats. "By refusing to license its technology, the new entity would impose Winamp as the dominant music player Given their technical limitations, competing music players [would] exert no competitive constraint on the pricing of Winamp."¹⁹⁷ As a result, AOL/Time Warner would control this "dominant player software and could charge supra-competitive prices for it."¹⁹⁸

In order to remedy the concerns of the Commission, the parties agreed to sever the connections between AOL Europe and Bertelsmann and to keep Bertelsmann music available online for other music players, thus avoiding the exclusive use of Winamp.¹⁹⁹ The Commission then declared the proposed merger compatible with the Common Market.

3.3. MCI WorldCom/Sprint

The Commission decision in the proposed merger of the U.S. telephone and Internet giants MCI and Sprint was the first to actually stop a deal from going through. There are a number of factors that make *MCI/Sprint* different from *GE/Honeywell*. First, the deal did not receive the blessing of the U.S. authorities before the Commission reached a negative verdict. Second, after they had encountered strong opposition from the Commission, the parties actually decided to abandon the enterprise. However, since MCI and

¹⁹⁵ AOL/Time Warner, *supra* note 4, paras. 46-59. Mario Monti noted that with this merger, "AOL could have emerged as the gatekeeper in the emerging market for Internet music delivery on-line." Monti, *FORDHAM INT'L L.J.*, *supra* note 194, at 1610.

¹⁹⁶ AOL/Time Warner, *supra* note 4, para. 65.

¹⁹⁷ *Id.* para. 62.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* para. 95.

Sprint did not formally withdraw the notification, the Commission had to render a formal decision.²⁰⁰

The Commission identified the key market affected by the merger as top-level or universal Internet connectivity.²⁰¹ MCI WorldCom had a market share of 40% to 60% whereas Sprint, the second largest top-level network provider, had a share of 10% to 15%.²⁰² The Commission concluded from these figures that the merger would lead to the creation of a top-level network provider that through its sheer size would be able to behave independently of its competitors and customers,²⁰³ and would lead to a dominant position.²⁰⁴ The Commission was thus satisfied with the high level of market shares, although it commented—consistently with the two-tier approach—on the impact the merger would have had on competition.

In comparison to the cases already referred to and especially in comparison to *GE/Honeywell*, *MCI WorldCom/Sprint* was relatively straightforward. It owes its prominence largely to the fact that it was the first case of a U.S. corporate merger prohibited by the Commission.

4. THE DECISION IN GE/HONEYWELL

By mid-2000, U.S. giants GE and Honeywell entered into negotiations for a possible merger or, to be more precise, a takeover of the latter by the former. On October 22, 2000, the parties signed an agreement pursuant to which GE agreed to acquire the entire share capital of Honeywell for a purchase price of \$42 billion. Thus Honeywell would have become a wholly owned subsidiary of GE. In October 2000 the parties notified the DOJ, and four months later, the Commission, of the proposed merger.²⁰⁵

4.1. *The Decision in the United States*

In its investigation, the DOJ identified two key markets that were affected by the merger: the market for military helicopter en-

²⁰⁰ MCI WorldCom/Sprint, *supra* note 5, para. 12.

²⁰¹ *Id.* para. 52-53.

²⁰² *Id.* para. 100.

²⁰³ *Id.* para. 145.

²⁰⁴ *Id.* para. 196.

²⁰⁵ The Commission was notified of the merger on February 5, 2001. Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (C 46) 6.

gines, and the market for providing heavy maintenance, repair, and overhaul ("MRO") services for aircraft engines and auxiliary power units ("APU"). This finding is interesting because, as will be seen, the Commission identified completely different markets, most prominently those of avionics and jet aircraft engines, as being at the heart of the decision.

With regard to the first market, GE and Honeywell are the two premier manufacturers of U.S. military helicopter engines, collectively accounting for a substantial majority of all engines powering military helicopters flying today.²⁰⁶ The DOJ found that the merger would have substantially lessened competition in the production of U.S. helicopter engines which, consequently, could expose the U.S. military to higher prices, lower quality, and reduced innovation in the design, development, and production of the next generation of advanced U.S. military helicopter engines.²⁰⁷ In order to remedy this concern, the DOJ required the parties to divest Honeywell's helicopter engine business that generated revenues of \$200 million in 2000.²⁰⁸

With regard to the second market, the DOJ feared that a range of commercial business aircraft users would likely have suffered increased prices and reduced quality in the repair and overhaul of Honeywell aircraft engines and APUs as a likely result of the strong and combined position of the merged company. The DOJ therefore required the parties to authorize a new third-party MRO service provider for certain models of Honeywell's aircraft engines and APUs to introduce a new player in this market and thus allow for more competition. With these conditions implemented, the DOJ expressed the view that competition in both markets "will continue to flourish," and on May 2, 2001, reached the appropriate agreement with the parties.²⁰⁹

²⁰⁶ They also received virtually all of the applicable research and development funding provided by the U.S. Department of Defense through its Joint Turbine Advanced Gas Generator. Press Release, DOJ, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

4.2. *The Case Before the Commission*

4.2.1. *History*

The Commission had knowledge of the proposed merger at the time notice was given to the U.S. authorities, and it is very likely that it was involved in talks with the parties from that time on.²¹⁰ However, the Commission was not formally notified of the merger proposal until February 2001. This was not only four months after the notification in the United States, but probably also after the DOJ had indicated that it would allow the deal to go through. It could be that GE had hoped that the U.S. decision would put pressure on the European authorities to approve the deal as well.²¹¹ The first setback occurred on March 1, 2001, when the Commission decided to open a full investigation into the merger.²¹² This in and of itself was already an alarming sign, since about 95% of all cases do not reach this stage. As a reason for its decision, the Commission stated that the first phase of the investigation indicated that the merger might bring about horizontal overlaps in the market for large regional jet engines, which would significantly reduce the existing degree of competition in this market. In the Commission's view there were also vertical effects "to the extent that Honeywell is a supplier of components to competing engine manufacturers."²¹³ Furthermore, there were conglomerate effects "stemming from the possible bundling of jet engines, avionics and non-

²¹⁰ U.S. Assistant Attorney General Charles James, in a speech before the OECD Global Competition Forum in Paris, stated that the Commission had been informed and involved in the discussions throughout the U.S. investigation. U.S. Assistant Attorney General Charles A. James, Address Before the OECD Global Forum on Competition (Oct. 17, 2001). Competition Commissioner Mario Monti denied this fact, saying that he had some useful telephone conversations with Mr. James in the days beforehand, but that it was "unfortunately impossible to have any discussions at all at the highest policy level." Briggs & Rosenblatt, *supra* note 13, at 28.

²¹¹ The parties approached both authorities at the same time, in early November 2000, to discuss the competition problems. However, it is said that it took GE and Honeywell a very long time to prepare Form CO to the satisfaction of the MTF. See Patterson & Shapiro, *supra* note 62, at 22.

²¹² See Press Release IP/01/298, Commission Opens Full Investigation into the General Electric/Honeywell Merger (Feb. 3, 2001), available at <http://europa.eu.int/rapid/start/cgi/guesten.ksh?reslist> ("[T]he Commission will make a detailed assessment of the impact of the transaction on competition . . .")

²¹³ *Id.*

avionics [that are] likely to foreclose competition in these markets.”²¹⁴

On May 8, 2001, GE received from the Commission a 155-page statement of objection to the deal, reflecting continuing concerns about the likely affected markets. This was a clear indication of the upcoming difficulties. The statement invited the parties to strengthen their efforts to reach an agreement with the Commission and stated that the merger would not be allowed in its current form. In response, on June 14, 2001, GE and Honeywell submitted a package of undertakings to address the Commission’s concerns. When the Commission signaled that it did not consider this package sufficient, the parties withdrew the offer and submitted a new and substantially modified set of undertakings on June 28, 2001.²¹⁵ This again proved unsuccessful, and after intensive last minute negotiations, on July 3, 2001, the Commission formally decided to block the merger.

4.2.2. *The Reasoning of the Commission*

To the parties involved and their lawyers, the Commission’s decision came as a total surprise. They had not foreseen the degree and amount of opposition that the Commission had built up towards the proposed merger—particularly since the positive decision in the United States was based on the same facts.²¹⁶

In contrast to the DOJ, the Commission was not concerned about the market for helicopters and MRO services. This is not surprising because this market had very little effect on the Common Market and the issue had already been addressed and remedied by the DOJ investigation. Rather, the Commission identified a number of other affected markets. The most important of these

²¹⁴ *Id.*

²¹⁵ This submission was actually inadmissible because Article 18 (2) of Regulation 447/98 of March 1, 1998 on the Notifications, Time Limits and Hearings, states that commitments intended by the parties to form the basis of a decision of compatibility have to be submitted within three months of the decision to open proceedings, which in the case of *GE/Honeywell* would have been June 14, 2001. Commission Regulation 447/98, 1998 O.J. (L 061) 1, 8. The Commission did not see any reason that would justify an extension of the given timeframe.

²¹⁶ See Helen Power, *The Honeywell Monster*, THE LAWYER, July 23, 2001, at 24-27.

markets were those for jet aircraft engines, avionics, and engine starters, to be addressed in detail below.²¹⁷

4.2.2.1. *The Market for Jet Aircraft Engines*

According to the Commission, the market for jet aircraft engines had to be divided into three categories which depended on the markets for aircraft:²¹⁸ (a) large commercial aircraft, i.e., those with more than 100 seats and a range greater than 2000 nautical miles, (b) regional jet aircraft, i.e., those with around 30 to 90 seats and a range of less than 2000 nautical miles, and (c) corporate jet aircraft, i.e., those designed for corporate activities.²¹⁹

4.2.2.1.1. Market Share

In the market for large commercial aircraft engines, of the two parties to the merger, only GE was active. Apart from GE, the players in this market are Pratt & Whitney and Rolls-Royce. It was undisputed that the position of GE in this market before the merger was strong. In terms of installed engines, GE had an overall market share of 52.5%, compared to Pratt & Whitney's 26.5% and Rolls-Royce's 21%.²²⁰ A share of just over 50% lies in the gray zone of possible dominance as evidenced by market share and well above the unofficial safety line of 40%.²²¹

In the market for regional aircraft engines both GE and Honeywell were again competing with Pratt & Whitney and Rolls-Royce. However, the Commission concluded that there were distinct markets for large and small regional aircraft and found that only GE and Honeywell were supplying engines for the large

²¹⁷ The Commission also commented at length on other markets that are of less importance to this Article.

²¹⁸ The Commission stated that the engines are complementary products to the aircraft, the sale of one being of no value without the sale of the other. As a consequence, in defining the relevant jet engines product markets, one needs to take into account the competition between the end-use applications – that is, between the types of aircraft that final buyers consider suitable. GE/Honeywell, *supra* note 7, para. 9.

²¹⁹ *Id.* para. 10.

²²⁰ *Id.* para. 70 (quoting data provided by the parties and based on installed base of engines on large commercial aircraft in service on December 21, 2000). The picture is different when one looks at the shares of orders for engines as of January 1, 2001. Here, GE has a share of 65%, Pratt & Whitney 16%, and Rolls-Royce 19%.

²²¹ See sources *supra* note 89.

ones.²²² Of the two, GE had a share of between 60% and 70% in the market for aircraft which are still in production, and Honeywell, which only supplied the engine to one type of aircraft, a market share of between 30% and 40%.²²³ The position of GE in this market was thus already considered dominant. With the acquisition of Honeywell, the combined market share would have amounted to 100% and thus a monopoly position.

Both GE and Honeywell were active in the market for corporate aircraft engines and were competing with Pratt & Whitney as well as Rolls-Royce. Here, GE's position was weaker, with engines installed mostly in aircraft that were no longer in production. GE's market share of overall engines installed was 10% to 20%, Honeywell's was 40% to 50%, Pratt & Whitney's 30% to 40%, and Rolls-Royce's 10% to 20%.²²⁴ Honeywell's position in this market could thus be described as strong, and the combined market share of the new company after the merger would have been between 50% and 60%.

4.2.2.1.2. Dominant Position

There are two questions to be addressed in connection with the issue of dominance: first, whether or not GE or Honeywell had already enjoyed a dominant position before the merger; and, second, whether either previously non-existing dominance could be created or previously existing dominance could be strengthened through the merger.

4.2.2.1.2.1. Pre-Existing Dominance of GE or Honeywell

The Commission did not find GE's market share of about 60% in the market for large aircraft engines sufficient to establish market dominance *per se* although it found it to be *indicative*.²²⁵ A similar opinion was taken with regard to Honeywell's position in the market for corporate jet aircraft engines.²²⁶ Not surprisingly, in the market for large regional aircraft engines, with a share of 60%

²²² GE/Honeywell, *supra* note 7, paras. 19-29

²²³ *Id.* para. 84.

²²⁴ *Id.* para. 88 (based on data provided by the parties).

²²⁵ *Id.* para. 83.

²²⁶ *Id.* para. 89.

to 70%, the Commission considered GE as already dominant²²⁷ — without having to resort to other factors.

Having failed to establish dominance in the market for large aircraft engines based on market share alone, the Commission had to turn to other factors that would enhance GE's position, and here it focused on GE's overall strength, especially its financial strength. First, the Commission commented on GE's financial arm, GE Capital.²²⁸ This subsidiary managed about \$370 billion and thus more than 80% of GE's assets. The Commission maintained that through the financial strength of GE Capital, GE would gain a significant advantage over its competitors who had nothing equivalent. GE Capital could, in the view of the Commission, be used to absorb potential product failures and strategic mistakes.²²⁹ GE could also use (and had done so in the past) the financial strength to heavily discount prices for jet engines. Moreover, the Commission argued that the financial strength of GE Capital could be used, and had been used, to afford significant financial support to airframe manufacturers in platform program development assistance, and thus obtain a monopoly for engines for those airframes.²³⁰ The Commission held that these exclusive agreements would significantly affect the engine market since they guaranteed significant penetration of an airline's fleet and subsequent incumbency benefits.²³¹ Apart from influencing the manufacturers of airframes, the strength of GE Capital could also be used to influence airlines in their buying decisions. The Commission quoted from a book written by Jack Welch, CEO of GE, recounting a loan which GE Capital arranged for Continental Airlines when the airline was in

²²⁷ *Id.* para. 87.

²²⁸ *Id.* paras. 107-20.

²²⁹ As evidence for its argument, the Commission cites the example of Rolls-Royce who, after the failure of one of its R&D projects in the 1970s, had to exit from the relevant market. *Id.* para. 110.

²³⁰ In return for putting in a \$2 billion advance order for the long-range version of Boeing's 777, GE was designated the exclusive engine supplier for the plane. GE has secured a total of 10 exclusive positions out of the last 12 that were granted by airframe manufacturers. *Id.* para. 114.

²³¹ *Id.* para. 155.

financial difficulty in 1993.²³² A few months later, Continental ordered GE engines for its aircraft.²³³

Next, the Commission addressed the position and powers of GE Capital Aviation Services ("GECAS"), GE's airplane leasing division and—with a share of 10% of purchases of all new aircraft—the world's largest airplane buyer.²³⁴ GECAS has the largest single fleet of aircraft with 1040 units, making it twice as big as its direct competitor, International Lease Finance Corporation ("ILFC"). The Commission stated that GECAS could enhance GE's position in the market through attractive financing packages for purchasing deals of large aircraft. Over the past decade, of more than 600 planes purchased by GECAS, only four did not have GE engines. While GECAS' innovative financing techniques could result in attractive packages for customers, the Commission thought it would create an unfair advantage over competitors like Rolls-Royce and Pratt & Whitney because GECAS could demand the use of GE engines on all plane purchases.²³⁵

The Commission concluded that the combination of the advantages GE enjoyed through GE Capital and GECAS made GE's high market shares "proxy for dominance."²³⁶ This is aggravated by the fact that GE's competitors were not in a position to offer anything even close to the financial services of GE.²³⁷ The Commission concluded that given the nature of the jet engines market, GE's position with many airlines, its incentive to use GE Capital's powers with customers, and its ability to leverage its vertical integration through GECAS, GE appeared to be in a position to behave independently of its competitors, customers, and ultimately, consumers. It therefore concluded that GE could be characterized as a

²³² *Id.* para. 117 (quoting John Curran, *GE Capital: Jack Welch's Secret Weapon*, *FORTUNE*, (Nov. 10, 1997), available at <http://www.ge.com/news/welch/articles/f1197.htm>). After the deal, consultant Tichy is quoted as having said cryptically: "Capital is part of the arsenal for GE's industrial side to *beat the competition*." *Id.* (emphasis added).

²³³ In fact, Continental Airlines aircraft use predominantly GE engines. The Commission showed figures according to which the airline chose GE engines over those of its competitors every time it had a choice. *Id.* para. 119.

²³⁴ *Id.* para. 122.

²³⁵ *Id.* para. 127.

²³⁶ *Id.* para. 163.

²³⁷ *Id.* paras. 173-223.

dominant undertaking in the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.²³⁸

In order to overcome the reservations of the Commission, GE offered, *inter alia*, to maintain GECAS as a separate legal entity and to conduct its dealings with Honeywell on an arm's-length basis.²³⁹ An independent expert would monitor compliance. Not surprisingly, the Commission was unsatisfied with this offer. It argued that the mere legal separation of the entity would not affect its management, and thus control would remain in the hands of GE. Most importantly, the separation would not prevent GECAS from exercising and continuing the commercial strategy of GE.²⁴⁰

4.2.2.1.2.2. Creation or Strengthening of Dominance Through the Merger

Because GE had already enjoyed a dominant position in the market for large commercial jet aircraft engines and regional aircraft engines, the merger had to lead to a *strengthening* of this position in order to meet the requirements of ECMR Article 2.²⁴¹ In the market for corporate aircraft engines where Honeywell was "only" strong, ECMR Article 2 required the *creation* of such dominance. Traditionally when assessing this question the Commission can

²³⁸ *Id.* para. 229.

²³⁹ *Id.* para. 498. In a second step, GE offered to divest 19.9% in GECAS. This offer was held by the Commission to be insufficient because it would have left GE with a substantial and decisive share in GECAS and would not have changed the influence of GE over GECAS' policy. There is an argument as to whether this share should have been sold to competitors or as part of a public sale. Götz Drauz, head of the Merger Task Force, stated: "We never said you have to sell it to competitors, we only said you have to find a way to guarantee independence, and that was translated by some as meaning you have to sell to competitors." Power, *supra* note 216, at 26.

²⁴⁰ GE/Honeywell, *supra* note 7, para. 531. It must also be noted that a divestiture of GECAS would, at this point, have only eliminated its financial powers related to the *pre-existing* dominance of GE in the large jet aircraft engine market. Even if GE had sold GECAS completely and had thus convinced the Commission that there was no *pre-existing* dominance by GE in this market, it is very unlikely that the merger would have received the Commission's blessing. It would still have been possible, indeed likely as will be shown below, that the merger would have *created* a dominant position of GE, so the result of the investigation would not have changed.

²⁴¹ As in the United States, the mere existence of a dominant position is not illegal under European law, as long as it is not abused - in which case it can be subject to a review under EC Article 82.

look at the vertical, horizontal, and conglomerate effects of the merger.²⁴²

4.2.2.1.2.2.1. Horizontal Effects

Since Honeywell was not active in the market for large commercial jet aircraft engines, the question of horizontal effects was limited to the market for large regional and corporate jet aircraft engines, where both companies competed with one another. In the market for large regional aircraft engines, GE was already dominant. The addition of its competitor Honeywell, despite its fairly small market share, would lead to a monopoly.²⁴³ In the corporate jet engine market, Honeywell was already the leading player. The addition of GE's market share would lead to a combined market share of 50% to 60% of the overall installed base of corporate aircraft and 80% to 90% of the installed base of engines on medium corporate aircraft. In the Commission's view this combination of market share would create a dominant position.²⁴⁴

The parties responded to the Commission's findings regarding the large regional jet aircraft engine market by offering to divest that part of their business that manufactures engines for certain new aircraft. Apart from the fact that the Commission doubted there was a purchaser for the business, it held that since the engine was still in development, the divestiture to a third party would "lead to significant uncertainty as to the timetable of the development as well as to the sales prospects of the aircraft."²⁴⁵

4.2.2.1.2.2.2. Vertical Effects

With regard to large commercial aircraft engines, the concern for the vertical effects of the proposed merger focused on Honeywell's strong position in the market for engine starters.²⁴⁶ The vertical foreclosure of the competing engine manufacturers resulting from a vertical relationship between GE as an engine manufacturer and Honeywell as a supplier of engine starters to GE and its com-

²⁴² WHISH, *supra* note 22, at 774; Monti, *supra* note 12, at 6.

²⁴³ The increase was not so small that it could have qualified as insignificant under a *de minimis* rule.

²⁴⁴ GE/Honeywell, *supra* note 7, para. 437.

²⁴⁵ *Id.* para. 519.

²⁴⁶ *Id.* para. 420. See also, *infra*, Section 4.2.2.3.

petitors concerned the Commission.²⁴⁷ Following the proposed merger, the merged entity would have an incentive to delay or disrupt the supply of Honeywell engine starters to competing engine manufacturers, which would damage the supply, distribution, profitability, and competitiveness of these competitors. Also, the merged entity could increase the price of engine starters or their spares, thereby increasing rival engine manufacturers costs and further damaging their ability to compete. This would contribute to the further foreclosure of GE's competitors from the market for large commercial aircraft engines and strengthen GE's dominant position. With regard to the vertical effect on the market for corporate jet aircraft engines, the Commission was concerned about how GE's financial strength and vertical integration into financial services, aircraft purchasing and leasing, and other market services would effect Honeywell as a corporate jet aircraft engine supplier.

The merger would also have vertical effects by bringing together the leading engine supplier, Honeywell, with GE's corporate jet aircraft leasing company, GE Capital Corporate Aviation Group. Honeywell's engines and related services would benefit from GE's aircraft leasing and its purchasing practice of promoting GE products and services, as well as from its instrumental leverage ability to secure market placement for GE products. The integration of Honeywell and GE was, in the view of the Commission therefore likely to lead to foreclosure and elimination of competitors' ability to invest in the development of the next generation of corporate jet aircraft engines. Since Honeywell's corporate jet aircraft engine competitors would be unable to reproduce GE's financial strength and vertical integration, they would eventually have to reconsider their presence in the market and ultimately withdraw since their chances of winning a competition on the merits would be significantly reduced.²⁴⁸

4.2.2.1.2.2.3. Conglomerate Effects: Bundling

In *GE/Honeywell*, one of the main concerns of the Commission was the new company's ability to bundle its products. This was by no means an obvious concern. Rather, it came as a surprise to the parties because, as will be shown, bundling had not played a prominent role in merger control before. The Commission de-

²⁴⁷ *GE/Honeywell*, *supra* note 7, para. 419.

²⁴⁸ *Id.* para. 442.

scribed bundling as a simple business arrangement whereby a number of products are combined in a package and sold at a single price.²⁴⁹ Bundling, and here lies the crux of the problem, is thus essentially a behavioral problem: it addresses the question of how a market player uses its powers. Merger control, on the other hand, is concerned with the situation of the parties and the markets at the time of the merger, not with possible future behavior.

In the market for large commercial aircraft engines the Commission needed to show a strengthening of a dominant position. However, it did not state that the newly merged entity would use bundling to improve its market position.²⁵⁰ Rather, the Commission thought it sufficient that the merged entity “[would] have the *ability to engage* in packaged offers of engines, avionics and other services.”²⁵¹ Since none of its competitors could match this ability, or only at substantially higher costs, GE could be expected to attract new clients and retain existing ones. Ultimately, this would lead to the foreclosure of the market and the strengthening of GE’s existing dominance.²⁵² A similar approach was taken by the Commission with regard to the strengthening of GE’s already dominant position in the market for engines for large regional aircraft.²⁵³ In the market for engines for corporate jets, the Commission used the concept of potential bundling to determine the creation of a dominant position for the new company.²⁵⁴

Although it is probably true that the new company would indeed have the *potential* to bundle and it cannot be ruled out that at one point in time it might engage in this behavior, using this potential to conclude that the merger would strengthen a pre-existing dominant position within the meaning of ECMR Article 2 is questionable. Though the Commission is required by ECMR Article 2

²⁴⁹ *Id.* para. 293.

²⁵⁰ The Commission did state that bundling has repeatedly occurred in the industry. *Id.* para. 352. Dimitri Giotakos, Laurent Petit, Gaelle Garnier, and Peter de Luyk of DGIV argue that the incentives for the merged entity to sell bundles of products could have evolved over the short to medium term. Dimitri Giotakos et al., *General Electric/Honeywell – An Insight into the Commissions Investigation and Decision*, COMPETITION POLICY NEWSLETTER No. 3, Oct. 2001, at 10.

²⁵¹ GE/Honeywell, *supra* note 7, para. 412 (emphasis added). See also *id.* para. 434 (addressing the market for large regional aircraft), para. 443 (addressing the market for corporate jet aircraft).

²⁵² *Id.* para. 412.

²⁵³ *Id.* paras. 432-34.

²⁵⁴ *Id.* paras. 443-44.

to look at several aspects of a merger, and while conglomerate effects²⁵⁵ may, under certain circumstances, have a significant effect on the relevant market,²⁵⁶ it seems that the approach taken by the Commission in *GE/Honeywell* overstepped the line of adequate assessment and lacks support under the ECMR. There is no express provision therein nor decision of the ECJ or CFI interpreting the Regulation to support the Commission's assessment. The Commission must have been aware of this because it issued a statement stating that "various economic analyses have been subject to theoretical controversy."²⁵⁷ Describing the question of whether it is permissible to block a merger because of possible future bundling as theoretical understates its impact. This question strikes at the heart of EC merger control and can (and will) have serious repercussions on the conception and future application of the ECMR. This is not to say that bundling services and goods should not be subject to rigorous scrutiny by the Commission. On the contrary, the scenarios envisioned by the Commission require constant attention. However, the tool for this investigation is and must be EC Article 82, not the ECMR.

The parties tried to overcome the Commission's concerns by undertaking not to engage in bundling.²⁵⁸ The Commission regarded this effort as insufficient. It argued that the undertaking was "purely behavioral and as such cannot constitute the basis for a clear elimination of the said concerns."²⁵⁹ Even more interestingly, the Commission continued by saying that by not engaging in bundling, "the parties would become dominant or strengthen their dominant position but promise not to abuse it."²⁶⁰ Remarkably, the Commission, in its own statement, admits that it must have erred

²⁵⁵ Conglomerate effects describe the effect that may occur when merger parties are neither horizontal competitors nor active in vertically related markets.

²⁵⁶ This effect is mainly financial, i.e., the addition of the financial position of entities that are active in different markets. See, e.g., The decisions of the German Bundeskartellamt, *Rheinmetall/WMF*, WuW/E Kart 1867, *aff'd*, by the German Supreme Court, BGH, *Edelstahlbestecke*, WuW/E BGH 2150. See also Monti, *supra* note 12, at 6.

²⁵⁷ Francesco Guerrera, *Companies & Finance the Americas: How 'Dominance' Became Europe's Dirty Word in Takeovers*, FIN. TIMES, Oct. 4, 2001. Patterson and Shapiro, *supra* note 62, at 18, argue that the decision "is based on dubious economic grounds and very weak evidence."

²⁵⁸ *GE/Honeywell*, *supra* note 7, para. 498.

²⁵⁹ *Id.* para. 530.

²⁶⁰ *Id.* para. 532.

in its earlier finding that the potential to bundle may be a factor for the creation or strengthening of a dominant position. Now the Commission appears to separate bundling from the dominance issue (which would have been correct in the first place) and emphasizes the question of whether or not bundling in and of itself amounts to an *abuse* of a dominant position under EC Article 82. This is the correct approach and the Commission should have used it from the outset instead of using bundling as a factor in establishing the strengthening of dominance.

It has been argued that the concept of bundling had no valid foundation in European merger control and has not been applied before. While the first statement appears to be correct, the second one is not.²⁶¹ In *Guinness/Grand Metropolitan*,²⁶² a decision under the ECMR, two producers and distributors of spirits proposed to merge. The Commission found that there were different markets for different spirits and for different countries in which the parties were not active alongside each other and thus, that the merger had only limited horizontal effect.²⁶³ However, the Commission was of the opinion that the merger would lead to a larger portfolio which would benefit the new company vis-à-vis its competitors because it would be able to offer a range of products that would give it greater flexibility to structure its prices, promotions, and discounts. The merger would bring about a higher potential for tying and

²⁶¹ Francisco-Enrique Gonzales-Diaz refers to the Commission's investigation in Tetra Pak as a precedent for its decision in *GE/Honeywell*. *Roundtable Discussion*, *supra* note 133, at 11. However, this case was about the abuse of a dominant position (with elements of predatory pricing, tying, rebates, etc.) under Article EC 82 and not a merger decision. While it is true that the Commission in its assessment of dominance can and does rely on the proximity to EC Article 82 and on the case law of the ECJ pertaining to this provision, these principles may only be applied *mutatis mutandis*. Cf. Kauper, *supra* note 48, at 321 ("However 'dominant position' is defined, the language of the Merger Regulation suggests that the Commission is likely to measure competitive harm in terms of injury to competitors."). The case law on EC Article 82 has thus only limited relevance for merger control reviews. Closer to the concept of bundling as applied by the Commission in *GE/Honeywell* was an investigation of Digital Equipment under Article 85(1) of the EC Treaty. See XXVIIth Report on Competition Policy, para. 69 (1997), available at http://europa.eu.int/comm/competition/publications/broch97_en.pdf. Here the Commission objected to the fact that Digital offered prices that were more attractive when customers purchased software services in a package with hardware services than when purchasing software services alone.

²⁶² Case IV/M.938, *Guinness/Grand Metropolitan v. Commission*, 1998 O.J. (L 288) 24 [hereinafter *Guinness/Grand Metropolitan*].

²⁶³ *Id.* para. 31.

would put the new company in a position to realize economies of scale and scope in its sales and marketing activities.²⁶⁴ Thus *Guinness/Grand Metropolitan* was a "precedent" for *GE/Honeywell*—and in its time received fierce criticism.²⁶⁵ However, since the parties in *Guinness/Grand Metropolitan* made a number of substantial undertakings,²⁶⁶ the merger finally received the Commission's blessing—and therefore substantially less publicity than *GE/Honeywell* two years later.

Having criticized the position of the Commission as being without sufficient basis in the ECMR, and having thus joined the dominant chorus of commentators on the decision, it must also be observed that the issue of bundling, despite the publicity it received, was not as decisive as it has been portrayed. In fact, it was not a major component of the actual Commission decision, constituting only two pages out of the 130 page document, and the merger would most likely have been stopped if the Commission had omitted the issue altogether because of the horizontal and vertical effects of the merger already referred to. One is thus compelled to ask why the Commission bothered to take on the issue in the first place, stirring up as much controversy as it did. The Commission may well not have foreseen this reaction, or the Commission may have wanted to base its negative vote on as many arguments as possible to make it more legitimate and acceptable. One desired effect of this strategy could be to create precedent for future decisions where the Commission may have to rely on the question of bundling.

4.2.2.1.3. Impediment of Competition

As outlined above, in order to meet the requirements of Article ECMR 2(3), not only must the concentration have a dominant po-

²⁶⁴ *Id.* para. 40. The Commission took a similar position a few months earlier in Case IV/M.833, *The Coca Cola Company/Carlsberg A/S*, 1998 O.J. (L 145) 41, where the Commission concluded that a larger portfolio of different beverages would give a company an advantage over its competitors: "Generally this means that companies with . . . the broadest portfolio of beverages in their distribution system will have the lowest costs and be able to reach the highest number of customers." *Id.* para. 68.

²⁶⁵ See SIMON BISHOP & MIKE WALKER, *THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT* para. 6.42 (1999) (stating that the merger has no sound economic basis); Carl Shapiro's remarks in *Roundtable Discussion*, *supra* note 133, at 17 (saying the merger "lacks sound economic basis").

²⁶⁶ *Guinness/Grand Metropolitan*, *supra* note 262, para. 183.

sition but this position must result in an appreciable impediment of competition within the Common Market.

In *GE/Honeywell*, the Commission did not take the desirable step and inserted a new headline into its decision under which it would have answered the question whether or not competition would be impeded by the merger. One possible conclusion one could draw from this omission is that, contrary to what has been found earlier,²⁶⁷ there is no two-tier test but only one, which is sufficient to establish the creation or strengthening of dominance. However, when one looks at what the Commission actually says in the decision, it becomes clear that this is merely an omission on the part of another headline, whereas the substance of the question of impediment was addressed and answered in the affirmative.

4.2.2.2. *Market for Avionics*

Another key market that attracted the Commission's attention was Avionics. As already pointed out, this market was also of particular interest because of the opportunities it gave to GE and Honeywell in terms of a possible bundling.

Avionics products include equipment used for the control of the aircraft, for navigation and communication, as well as for the assessment of flying conditions.²⁶⁸ In Avionics, Honeywell had a market share of between 50% to 60%. Its main competitors were Rockwell Collins with a share of 20% to 30%, Thales, with a share of between 10% to 20%, and Smiths Industries with a share of up to 10%.²⁶⁹ Again, the position of Honeywell, in sheer terms of market share, was very strong.

As already mentioned, in the eyes of the Commission, the merged entity would be able to offer a package of products that had never been put on the market together prior to the merger and that could not be challenged by any other competitor on its own. The sale of complementary products through package deals may take several forms. It may include, for instance, mixed bundling whereby complementary products are sold together at a price that, owing to discounts applied across the product range, is lower than the price charged when sold separately. It may also take the form

²⁶⁷ See *supra* Section 2.1.2.1.

²⁶⁸ *GE/Honeywell*, *supra* note 7, para. 231. See also Case COMP/M.1601, *Allied Signal/Honeywell v. Commission*, 2001 O.J. (L 152) 1.

²⁶⁹ *GE/Honeywell*, *supra* note 7, para. 242.

of pure bundling whereby the entity sells only the bundle but does not make individual components available on a stand-alone basis.

Pure bundling may also take the form of technical bundling, whereby the individual components only function effectively as part of the bundled system, and cannot be used alongside components from other suppliers. In other words, they are made incompatible with the competitor's components.²⁷⁰ The proposed merged entity would have been able to price its packaged deals in such a way as to induce customers to buy GE and Honeywell products rather than those of its competitors, thus increasing the combined share of GE Honeywell on both markets.

In terms of the question of vertical integration of Honeywell with GE, the Commission objected for the same reasons as with its corporate jet aircraft engine market analysis. It felt the combination of Honeywell with GE's financial strength and vertical integration in financial services, aircraft purchasing and leasing, as well as in after-market services, would contribute to the foreclosure effect already described.²⁷¹ Following the proposed merger, the Commission predicted Honeywell's product range would benefit from GE Capital's ability to secure exclusive positions for its product with airlines and GECAS' instrumental leverage ability to foster the placement of GE Products, thus extending its "GE only" policy to Honeywell products.²⁷²

GE's strategic use of GECAS and GE Capital's financial strength would position Honeywell as a dominant supplier of avionics where it already enjoys leading positions. In light of their inability to reproduce financial strength and integration to any significant degree, rival manufacturers would progressively reconsider their strategy and choose not to compete fiercely in those markets dominated by the merged entity.

4.2.2.3. *Market for Engine Starters*

In view of Honeywell's horizontal position within the market for aircraft engines,²⁷³ the Commission also emphasized the market for engine starters.²⁷⁴ Honeywell's share in this market was esti-

²⁷⁰ *Id.* para. 351.

²⁷¹ *Id.* para. 405.

²⁷² *Id.* para. 406.

²⁷³ *See infra* Section 4.2.2.1.

²⁷⁴ GE/Honeywell, *supra* note 7, paras. 331-40.

mated to be between 50% to 60%. The only real competitor for Honeywell in this market was Hamilton Sundstrand, with a share of between 40% to 50%. However, since Hamilton Sundstrand's starters are only installed in the engines of its sister company, Pratt & Whitney,²⁷⁵ they are not available in the general market. Hamilton therefore could not be considered a competitor. Honeywell would thus be the only large independent supplier of engine starters.

The Commission concluded that through the merger with GE and its horizontal effects previously discussed, Honeywell would become dominant in the market.²⁷⁶

In order to overcome the Commission's concerns in this field, the parties offered to divest Honeywell's engine starter business.²⁷⁷ The Commission's reaction was that it interpreted the offer to mean that the would-be divested business would not include certain parts that needed to be purchased together. Since the new company would try to command this part of the market, the divestiture could not have the necessary effect.²⁷⁸

5. CONCLUSION

The fact that the European and U.S. merger control systems are based on different approaches was well known long before the Commission's decision in *GE/Honeywell*. It was also clear that, in view of the ever-increasing number of international mergers, it was only a question of time before the two different systems would arrive at different conclusions.

As the first wave of heated discussion subsides, it should be clear that the discussion should not revolve around which system is better:²⁷⁹ there is, yet, no possibility of one system adapting to the other.²⁸⁰ Rather, as with any judicial or administrative decision,

²⁷⁵ In this respect the figures given for the market share reflect production volume and not sales in the market. Hamilton, by supplying Pratt & Whitney, has a lower market share in the overall engine market. *Id.* para. 338.

²⁷⁶ *Id.* para. 341.

²⁷⁷ *Id.* para. 493.

²⁷⁸ *Id.* para. 516.

²⁷⁹ Cf. Briggs & Rosenblatt, *supra* note 13, at 30 (arguing that both the U.S. and EC authorities may have had valid reasons for their decisions).

²⁸⁰ Cf. Monti, *supra* note 12, at 17 ("[P]erfect convergence will never be achieved—a degree of divergence is unavoidable in a multi-polar world of sovereign jurisdictions, each with its own laws, enforcement authorities and courts."); Greaney, *supra* note 107, at 892 (arguing that the EU's adoption of American poli-

the discussion should focus on the question of whether the decision was properly based on the rules of the ECMR. Here the Commission's decision contains a number of points that deserve further discussion.

First of all, it is questionable whether the idea of bundling has a sufficiently legitimate basis in the ECMR. This was a major issue in the discussion about the validity of the Commission's decision, and there is much argument that there was no such basis and that the Commission, by applying this test, improperly changed the scope of the ECMR. Henceforth, merger parties must fear that the Commission, when assessing a proposed merger, will not only identify the relevant markets in the traditional sense and assess the horizontal and vertical effects created by the merger, but will also speculate how positions in markets that are not related might be combined, even if there is no clear evidence that such behavior will emerge. This approach not only takes away much of the legal certainty which was the major strength of the merger control process, but also blurs the distinction between merger control and post-merger EC Article 82 investigations. The type of behavior that had been addressed by the Commission requires a certain degree of evidence to act upon, and in the case of *GE/Honeywell*, there was not enough of that evidence available. It is therefore commendable that GE and Honeywell have launched separate appeals against the Commission's decision to the CFI—despite the fact that the merger in any event would not be revived.²⁸¹ In a few years' time,

cies would "serve neither the EU's interest in effective antitrust enforcement nor promote the need for a more certain rules governing border-spanning mergers"). However, the Commission in its ECMR Review Green Paper suggested that it is "an appropriate opportunity to open up a wider debate on the respective merits of the two tests, particularly in view of the acknowledged desirability of striving towards a greater degree of global convergence in merger control standards." ECMR Review Green Paper, *supra* note 39, paras. 11, 167. There has also been, for some time, talk about creating a new set of international competition law rules. See, e.g., Sir Leon Brittan, A Framework for International Competition, Address at the World Competition Forum (Feb. 3, 1992) (referring to the WTO as an appropriate forum for devising rules on competition or the efforts by the Global Competition Network, an informal discussion round of high ranking competition officials from Europe and the United States). For an overview of recent attempts for an international competition regime, see Baker, *supra* note 1, at 583-87, and Rodger, *supra* note 1, at 312-19.

²⁸¹ The parties apparently fear that some of the Commission's findings, especially those pertaining to the position of GE in the jet engine market, could be used by competitors in future disputes.

it will be known if the CFI, or ultimately the ECJ, will condone the position of the Commission.

Having elaborated on the validity of the bundling issue, it must also be stated that this question attracted far more attention outside the merger decision than within. First, the question of bundling was of fairly limited importance in terms of the overall decision, and, taking into account the space the Commission assigned to it, the Commission clearly intended it to be that way. Second, the question of bundling was by no means decisive for the outcome of the investigation. On the contrary, it could probably have been left out without changing the outcome.

Apart from the controversial question of bundling, it is fair to say that the Commission's decision appears to fall within the limits of European merger control. This does not mean that some of the results and findings of the Commission could not have arrived at a different disposition. On the contrary, for example, there are good arguments that the Commission could have, and indeed should have, given less weight to the importance of GE's financial arm. This could have resulted in GE not being assigned a dominant position in the first place, thus increasing the likelihood that the merger may have been approved. However, the Commission was within its margin of discretion in emphasizing the various factors and parameters as it did.

GE/Honeywell will not be the end of the story of two merger control systems, both with strengths and weaknesses, appearing to compete with each other. The European and U.S. authorities will before long arrive again at different conclusions, and these decisions, especially if they concern mergers that predominantly affect the other jurisdiction, will cause further heated discussions. One lesson that should have been learned from the decision is that there is no "better" system. What *GE/Honeywell* has taught the United States is that one must look very closely at how the Commission interprets the ECMR and what conclusions can be drawn from that interpretation.

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